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AN EVALUATION OF THE SEXUAL ASSAULT PROVISIONS OF BILL C-127 FREDERICTON AND SAINT JOHN, NEW BRUNSWICK

J. & J. Research Associates

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The views expressed herein are solely those of the author and do not necessarily represent the views of the Department.

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EXECUTIVE SUMMARY

INTRODUCTION

As part of the Department of Justice's commitment to monitoring new legislation, an evaluation of the sexual assault provisions of Bill C-127 was undertaken in several Canadian jurisdictions. These evaluations employed the same research design and research instruments so that data from each research site could be synthesized into a more general process and outcome evaluation of this legislative initiative. This present study examines the impact of Bill C-127 in two New Brunswick jurisdictions, Fredericton and Saint John. As one of several similar evaluations in other parts of Canada, the objective of the research is to contribute to a more general understanding of how this legislation is working and the extent to which it attains the objectives sought by those who advocated for a change in the way sexual assault is dealt with in the Canadian criminal justice system.

As in the other evaluations, this research is based around five research components and data sources: a) criminal justice files; b) sexual assault centre files; c) interviews with informants in the criminal justice system and related agencies; d) interviews with victims of sexual assault; e) court observations of sexual assault trials. While each was intended to generate data of interest in its own right, the more general expectation was that, in the end, these data sources should coalesce to provide a many-sided summative evaluation of the sexual assault legislation.

The aim of this evaluation was to provide information on both the practice of the new legislation, as well as the intended and unintended consequences. Thus, one goal was to describe how the new legislation had been implemented and how it has been interpreted by the key actors. A central objective of the evaluation was to determine whether there are changes in criminal justice system attitudes and practices and in victim's experiences with the system which can be directly attributed to the implementation of Bill C-127.

BACKGROUND

After nearly a decade of discussions about possible rape law reform and intensive feminist advocacy, Bill C-127 came into force in January 1983. The reforms enacted were a response to growing criticism of the way sexual offences were treated by the criminal justice system. Dissatisfaction with the previous law centered around the low conviction rate in sexual assault cases, the victims' negative and painful experiences with the legal process and the patriarchal attitudes and incorrect ideas which were reflected in, and reinforced, by the old law.

Bill C-127 ushered in a number of dramatic changes. It abolished the words rape and indecent assault; it changed some of the evidentiary requirements for trials; it removed spousal immunity; and it made the law gender neutral. The objectives of these reforms were three-fold: a) to encourage more women (and now men) to report sexual assaults; b) particularly for women, to remove some of the secondary victimization experienced by complainants in the criminal justice system; c) to make it easier to obtain a conviction. It was also hoped that substituting new offences and new labels and changing the special evidentiary rules associated with the crime of rape would eliminate some of the myths and stigma surrounding rape. In other words, the new sexual assault legislation was to have an impact on both the victim and the criminal justice system.

The research design for this evaluation is modelled on the classical experimental design to the extent that, where feasible, before and after comparisons are used. Police, Crown and Fredericton Rape Crisis Centre files were analyzed for the two years previous to the new legislation coming into force, for the transitional year, 1983, and for the four years following the implementation of the legislation. In addition, various informants in the criminal justice system and related agencies and services, who had experience of both the previous and present legislation, were asked their perceptions of what changes had and had not taken place and, in general, were asked to assess the impact of Bill C-127 in reaching the anticipated objectives.

DATA SOURCES

Data were collected for the 212 adult cases reported to the Fredericton and Saint John Police and the RCMP serving the areas which lie outside these cities but which come within the jurisdiction of the criminal courts in the two cities. Some 70 of these cases proceeded to prosecution and the court and crown files for these were also analyzed. Over the period covered by this evaluation, the Fredericton Rape Crisis Centre completed intake forms for 140 adult sexual assault victims. The data in these files were also collected and analyzed.

Interviews were conducted with 47 informants working in the criminal justice and related agencies. This figure includes most of the judges in the provincial courts and in the two Courts of Queen's Bench who hear criminal matters, the crown attorneys in both courts, police officers and victim witness workers who deal regularly or specifically with sexual assault cases and defence lawyers whose practice includes a substantial amount of criminal law. Present volunteers at the Fredericton Rape Crisis Centre and medical practitioners who, because of the nature of their practice, are likely to see and treat many of the victims of sexual assault were also interviewed. Through a variety of means, 17 victims of sexual assault came forward who were willing to relate their experience with and perceptions of the criminal justice system and the new legislation. Finally, the four trials and one appeal which took place over the period of this evaluation were systematically observed.

The findings described in this report are based on a census, rather than a sample, of sexual assaults reported to the police in the two jurisdictions between 1981 and 1987, as well as interviews with virtually all of those who, in one capacity or another, deal regularly with these cases. It is, however, important to note that the findings and conclusions of this study apply only to cases of sexual assault where, at the time of the alleged offence, the victim was 16 years or older. A separate study initiated by the province is examining a number of aspects of sexual assault cases where the victim was under 16 at the time of the offence.

GENERAL FINDINGS

In the period before Bill C-127 came into force, police classifications were fairly evenly divided between s. 143, rape, and s. 149, indecent assault on a female. In the period after Bill C-127 came into force, 97 per cent of reported sexual assault cases were classified by the police under s. 246.1, sexual assault. There were, in other words, only five cases where other tiers -- s. 246.2 and s. 246.3, aggravated sexual assault and sexual assault with a deadly weapon -- were used by police to classify an offence and to recommend a charge to the crown.

At the same time, before and after comparisons suggest that the nature and patterns of sexual assault have not changed appreciably, if at all. In particular, sexual intercourse, actual or attempted, is the basis of the complaint in 35 per cent of cases in both time periods. One difference between the two periods is that prior to 1983, 48 per cent of cases were described in the police files as "touching and grabbing" compared to about 22 per cent in the years after the legislation came into force. In the latter period, a larger proportion of cases appear to involve more than one type of sexual contact and incidents suggesting a wider interpretation on the part of victims as to what constitutes a sexual assault. While a weapon was involved in only 14 per cent of cases, 59 per cent and 48 per cent respectively of victims in both time periods reported physical force or verbal threats as part of the sexual assault.

The time, the location and the activity preceding the incident have not changed over the period covered by this evaluation. Sexual assaults are fairly evenly distributed over the days of the week and months of the year and mainly occur at night. About one quarter of sexual assaults occurred in the victim's home and another quarter occurred in a public place or on the street with the result that the most common activities were being at home or out walking.

The gender neutral language of the legislation and the fact that an offender married to the victim is no longer immune from prosecution, has not in these two jurisdictions led to a different pattern of offender-victim relationships. There have been 12 cases involving two males and three cases involving a legally married couple, but the vast majority of victims, in the years following and prior to the legislation, were young single women who had been assaulted by a male. If there is a change, it is that prior to

the legislation 80 per cent of victims did not know their assailant or had little knowledge of him compared to 60 per cent of victims in the post legislation period. At the same time, despite the greater likelihood of victims knowing the assailant and, in turn, reporting him, only about two per cent of cases in both periods could be classified as a "date rape".

REPORTING PROCESS

One of the objectives of the reform of legislation was to encourage more victims of sexual assault to report the incident to the police. The number of cases reported to the Police and to the Fredericton Rape Crisis Centre have remained remarkably constant over the seven years included in this evaluation. On the assumption that the actual rate of sexual assault, in at least these two jurisdictions, has remained much the same during the 1980s, the conservative conclusion is that the provisions of Bill C-127 have had no impact, one way or another, on the likelihood of adult victims reporting a sexual assault.

The major impact of the abrogation of the rule of recent complaint appears to be that victims who have been subjected to a long history of abuse and sexual assault, often of an incestuous nature, are since Bill C-127, more willing to come forward and make a complaint to the police. Where the assault was a singular event, most victims still report to the police immediately or within 24 hours (73 per cent).

The research instrument used to collect data from the police files included a variety of questions about patterns of reporting and the subsequent procedures and practices of the police when a report of a sexual assault is received. Taken together, these various indicators do not suggest that dramatic changes have occurred with the implementation of Bill C-127. Rather, if allegations that police have been insensitive and cynical in their treatment of sexual assault victims were ever relevant to these two jurisdictions, it is apparent that changes in attitudes, practices and procedures took place some time before the new legislation was implemented.

At the same time, the ways in which victims report to the police have changed somewhat in the years after Bill C-127 came into effect. Changes that could be observed were modest but generally indicative of the efforts of police to be sensitive to the victims' needs. At the same time, there were signs of possibly greater confidence on the part of victims that they will be treated with dignity and respect. For example, victims are more likely (26 per cent versus eight per cent) to report in person and are more likely to make the first contact themselves (52 per cent versus 36 per cent).

Similarly, while the number of interviews, an average of just over two, has not changed, there is now a slightly greater likelihood that female victims will be interviewed by a female police officer and for there to be continuity, if further interviews are

required. Finally, while police defined just under 11 per cent of reported cases as unfounded, there is little difference in this between the two time periods.

Nor have subsequent police activity and success in closing a case through a charge changed over time. In particular, the filtering process by which cases are "lost" at various stages has, in terms of the basic statistics, remained very similar in the periods before and after Bill C-127. Although in about 70 per cent of cases, the victim was able to identify a suspect, the alleged assailant was apprehended in 49 per cent of reported cases in each of the time periods, and charges were laid in 38 per cent of all cases initially reported.

OUTCOMES

In 92 per cent of sexual assault cases which went to prosecution, the crown prosecutor proceeded with the charges recommended by the police. Overall, some 30 per cent of accused pled guilty. Here there are some differences: in the period after Bill C-127, 35 per cent pled guilty compared to 23 per cent in the period before the new legislation. Another important change is that in the post legislation period, 48 per cent of cases, compared to 11 per cent of cases in the prelegislation period were tried in a provincial court. Whatever the type of trial, in all, 70 per cent of accused who had not already pled guilty were found guilty.

Two-thirds of defendants recèived a prison sentence and another 23 per cent received a prison sentence and a fine. Closer and more detailed analysis of these cases does not suggest that there has been a systematic change in sentencing patterns or severity as a result of Bill C-127.

ASSESSMENTS OF THE IMPACT OF BILL C-127

On a wide range of variables, general case characteristics remain very similar before and after the legislation came into force as do the number of cases reported and subsequently prosecuted in any given year. Nor is there evidence which suggests that in the wake of the changes in evidentiary requirements changes in practices and procedures have become measurable. While there has been a slight increase in the proportion of defendants entering a guilty plea, changes are modest and, in any case, conviction rates and sentencing is very similar in the two periods which are compared here. On the basis of the evidence from the analysis of the criminal justice and the Fredericton Rape Crisis Centre files, the conservative conclusion is that there has been little or no change since Bill C-127 came into force.

This conclusion is at odds with the assessments of the majority of informants working within the criminal justice system who believe that there has been considerable change for the better in how sexual assault victims are treated within the system. And,

there is near unanimity that, either positively or negatively, Bill C-127 has had major impact legally and procedurally. With respect to the latter, police officers and crown attorneys agreed that it is now easier to proceed with a case in the absence of corroborative evidence, without recent complaint and with a victim whose past history and recent behaviour may, in the past, have made her "unrapeable." In turn, defence lawyers, many of whom are concerned about the implications for natural justice and due process of the provisions contained in Bill C-127, now see their job of defending a client as much more difficult but also believe that the victim is accorded more respect and dignity than in the past. Judges generally approve of the legislative reform but are agreed that the provisions have caused them to modify their instructions to a jury and to be stricter on the lines of questioning they will allow defence to pursue.

These interviews, as well as those with others who deal with sexual assault cases, provide a very positive assessment of how the criminal justice system is dealing with and treating sexual assault victims. On the whole, this is also the view of those victims whom it was possible to interview. Most felt that they had been treated with considerable compassion and sensitivity by both the police and the crown attorney who dealt with their case and by the judge. While, understandably, most did not like the defence lawyer and the cross-examination, none felt that they had been put "on trial" or that the questions were unreasonable. If there was dissatisfaction and bitterness, it was not in the reporting or trial process but in the shortness of the sentence given to assailants. Similarly, the observations of the four trials which took place over the period of this evaluation suggest strongly that not only the letter but also the spirit of the provisions of Bill C-127 have been implemented successfully.

CONCLUSIONS

The various data sources generate findings which lead to rather contradictory conclusions. There is, on the one hand, a general perception of change particularly in procedures, practices and attitudes; on the other hand, however, there is little in the way of systematic empirical data to confirm these definitions of situation. A probable explanation is that many of the perceived changes took place over a longer period of time than is encompassed within this particular evaluation. The case file analysis extended back only two years before Bill C-127 came into force, whereas the memories of some of the informants go back much further. Their view is that changes in attitudes and practices often proceeded Bill C-127 which itself was one outcome of changing attitudes about sexual offences and the rights of individuals to refuse unwanted advances and acts of a sexual nature. In short, the objective before and after measures of the evaluation are unable to capture the longer term changes which proceeded the legislation and which, in turn, may still be underway.

Second, the essential nature of sexual assault and of police procedures in criminal investigations suggest that we should probably not expect Bill C-127 to have made a marked impact on the filtering process and outcomes more generally. As this research

has shown, the nature and kinds of reported sexual assault offences have not changed much in recent years. While the vast majority are viewed as founded by the police, nearly half are filtered out almost immediately through the failure of the police to apprehend a suspect. For most of those that do proceed to prosecution, the police will have corroborative evidence such that, under either the old or new law, a conviction would be likely. Remaining are the few cases where the issue is one of consent and the victim's word against the accused's. Here, the changes in evidentiary requirements have considerable relevance to the trial outcome, but in this particular evaluation the number of such cases was far too small and too varied in their fact situation to reach any kind of conclusion about the legislation.

To sum up, whether the driving force has been the provisions of Bill C-127 or whether these provisions are manifestations of wider changes, there is consistent evidence that in these two jurisdictions, the basic objectives of the legislation are being met. Testifying within adversarial system is inherently a difficult and traumatic experience and is even more so when one is a victim testifying about one's own sexual victimization. But there is every indication in the findings of this evaluation that much is being done formally and informally to ensure that the ordeal is not exacerbated.

If there is an objective which does not appear to have been met, it is with respect to the likelihood that a sexual assault will be reported to the police. The data of this evaluation suggest that Bill C-127 has neither increased or decreased the level of reporting. Most victims who did report were not aware that there had been any changes in the law regarding sexual assault. And some may have carried with them what may be outdated views of how our society and criminal justice system treat victims of sexual assault. If the goal is to increase reporting of this kind of offence, then there is an obvious need to convey to potential victims the objectives of Bill C-127 and the changes which do appear to have occurred with respect to how victims are generally treated within the various parts of the criminal justice system.

1.0 ISSUES

1.1 Introduction

Feminist Susan Griffin spoke to the reality of many women in 1971 when she wrote, "I have never been free of the fear of rape. From a very early age I, like most women, have thought of rape as part of my natural environment -- something to be feared and prayed against like fire or lightning" (1971: 26). Sexual violence has been perpetuated against women since antiquity, and while there are cultures where rape is practically unknown, for example, the Arapesh of New Guinea (see Mead, 1963), rape continues to be a fact in most societies.

Historically, rape was treated as a crime against one form of property owned by men and retribution was made to the owner of that property: to the father in the case of a virgin and the husband in the case of a married woman (Brownmiller, 1975; Clark & Lewis, 1977). According to Clark and Lewis (1977: 117-118), "Rape laws were simply one of the devices designed to secure to men the ownership and control of those forms of property, and to provide a conceptual framework which would justify punishing men who violated the property rights of other men in this respect".

During the nineteenth century, the focus of rape laws shifted to protect women from sexual abuse in their own right. However, many of the underlying attitudes and stereotypes about rape persisted well into the twentieth century. According to Kinnon (1981), reflections of the attitude towards women as the property of men with only secondary rights of their own, and the concept of virginity and chastity as the standard of value for women, were apparent in Canadian law until the enactment of Bill C-127.

Many studies of why men rape have tended to stress the aggressive nature of male sexuality (Herman, 1984: 21). Some have shown that men charged with rape or attempted rape do not constitute a unique or psychopathological type, nor do they differ significantly from their class counterparts on standard personality measures (Amir, 1971). Recently, however, more attention is being paid, especially by feminists, to the socio-cultural conditions which give rise to rape. Griffin (1971), for example, argues that rape is an act of aggression, and that our cultural definitions and expectations which equate virility with strength and socialize males into sexually aggressive roles instruct and encourage men to rape.

With the reemergence of the women's movement in North America in the late 1960s and early 1970s, the fact of rape and its consequences for women became an important issue. Increasingly, more women focused their attention on the treatment of rape victims by the criminal justice system and stressed the importance of understanding sexual aggression from the perspective of victims. Rape victims, it was pointed out, have traditionally internalized the guilt imposed on them by society, which in turn has led to self-hatred, emotional breakdowns, secondary victimization, and suicide (James, 1982).

Feminists argued that the rape laws and practices protected male interests and reflected traditional and restrictive stereotypes of women. They maintained that the criminal justice system reinforced these stereotypes, both in the Criminal Code and in the courts. And they began to exert pressure on the legal system for changes to laws which they felt were unresponsive to women's concerns.

In the United States, rape law reform became a powerful and symbolic component of the movement to secure equal rights for women. Feminists argued that rape was a societal problem and that the existing laws ignored women's right to physical integrity and sexual self-determination. The relatively low rates of reporting, arrest, prosecution and conviction in cases of rape were presented as additional reasons for concern. Furthermore, feminists were able to effectively link their concerns to other lobby groups, including law reform bodies and law-and-order advocates to push for legislative changes (Chappell, 1984).

In Canada, feminists and women's group played an equally, although perhaps not as visibly important role. Like their American counterparts, they criticized the legal system for failing to protect the rights of women and lobbied for changes. On August 4, 1982, after nearly a decade of discussions about possible reform, Bill C-127 was passed in the House of Commons in response to intensive feminist advocacy. And on January 4, 1983, the most dramatic changes ever made to rape and sexual assault law in Canada came into effect (Heald, 1985). The new law abolished the words rape and indecent assault. It changed the evidentiary requirements for trials. It removed spousal immunity and it made the law gender neutral.

The Canadian reform was by no means unique. Rather it followed more than a decade of revision of rape laws which had been occurring throughout the common-law world (Chappell, 1984). As elsewhere, the reforms enacted were a response to growing criticism of the way sexual offences were treated by the criminal justice system. Dissatisfaction with the previous law centered around the low conviction rate in sexual assault cases, the victims' negative and painful experiences with the legal process and the patriarchal attitudes and incorrect ideas which were reflected in, and reinforced by, the old law.

The law reform was intended to improve reporting and conviction rates as well as alter the generally painful experience of the victim's participation in the criminal justice system. According to then Minister of Justice, Jean Chretien, the new legislation was meant to end the "inequity of the present laws" which placed an "unfair burden on female victims of sexual assault..."(quoted in Snider, 1985: 347). Also, there was an expectation that changes to the law would result in changes in the attitudes and practices in the criminal justice system as well as the attitudes and reactions of sexual assault victims (Macdonald, 1982d: 4).

1.2 Perceived Problems with the Previous Legislation

Prior to January 1983, there was no law of "sexual assault". Instead, the Criminal Code contained the offences of rape, attempted rape and indecent assault (Boyle, 1985). In Section 143, rape was defined as "sexual intercourse by a male with a female who is not his wife without her consent, or with consent if it is extorted by threats or fear of bodily harm, is obtained by impersonating her husband or by false representations of the nature and quality of the act" (quoted in Snider, 1985: 338). This meant, in effect, that the crown had to prove penetration of the vagina without the women's consent.

In addition, there were a number of special evidentiary rules associated with the crime of rape which feminists felt were discriminatory against women, each which made convictions difficult to obtain. In the words of lawyer, Clayton Ruby, "the easiest crime to get an acquittal on was rape ... It was just a defence lawyer's heaven" (cited in Stanley, 1985: 107).

In Canada as elsewhere, large number of statistics have been used to demonstrate that rape is one of the most underreported crimes and has one of the lowest conviction rates of all violent crimes. The Canadian Urban Victimization Survey shows, for example, that fully 62 per cent of female sexual assault victims did not report their victimization to the police (Solicitor General, Canada, 1985: 3). The survey also shows that reporting rates for sexual assault varied significantly from city to city. Montreal had the highest rate of reporting (50 per cent), followed by Toronto (40 per cent), and Edmonton had the lowest (15 per cent). As the authors indicate, "the factors which affect reporting of sexual assault are complex and many cannot be captured in such a survey. Based on the survey results, however, the reasons appear to have less to do with the seriousness of the incident than with the perceived willingness or ability of police and courts to offer protection and support to victims" (Solicitor General, Canada, 1984: 4).

The statistics on convictions are equally dismal. In their study of rape cases reported to the Metropolitan Toronto Police Department in 1970, Clark & Lewis (1977: 55-56) found that only 59.5 per cent of the founded rape cases were cleared by arrest. The national conviction rate for rape in 1971 was 54.6 per cent, whereas the general conviction rate for criminal offences was around 86 per cent. The conviction rate is especially low when one remembers "that the number of convictions for rape represents only a tiny fraction of the number of rapes committed"(Clark & Lewis, 1977: 56). It is hardly surprising that Clark and Lewis concluded that it was a myth that rape was treated as a serious offence.

Such statistics have, however, been criticized as confusing and misleading. Chappell (1984: 73-74), for example, maintains that "many of these statistics are of rather dubious quality and doubtful meaning". He maintains that comparing the figures for conviction in rape cases with other indictable offences is potentiality misleading for it fails to take into account the different solvability factors involved in the various

categories of indictable offences. If the rape convictions rate is to be compared with another indictable crime group, it should be with serious offences of violence: According to Chappell: "When such comparisons are made, it becomes apparent that the conviction rates for rape and offences of this type are not so dissimilar".

Many myths surround rape, including the assumption that sexual assaults most commonly involve strangers; only certain "types" of women are likely to be raped; and the victim must have done something to have provoked the rape. As a result, the rape victim has been stigmatized and made to feel guilty. These cultural attitudes have meant that many offences are either not reported or are filtered out of the criminal justice system.

1.3 The Filtering Process

A critical factor in understanding the statistics in rape or sexual assault cases is the filtering process. As a result of this highly selective process of elimination, there is reason to believe that only a small proportion of rape cases are ever publicly known. As Clark & Lewis (1977) concluded; only a fraction of all rapes are reported; only a fraction of those are classified as founded, of which only a fraction lead to an arrest; and only a fraction of the suspects arrested are convicted.

When a complaint is made to the police, they must decide whether the complaint is "founded" or "unfounded". "Unfounded" cases are not investigated. Such a classification scheme, however, is open to subjectivity and bias. In their research, Clark and Lewis found that the victim's background and character strongly influenced the way police classified her complaint. For example, the police were more likely to classify a rape as "unfounded" if the victim lived alone, if she had been drinking or if she was from a lower socio-economic status. Cases which were classified as "founded" (and thus having the potential to be successfully prosecuted) were those where the victim was middle class, "morally upright" and living under the "protection" of parents or husband. The exception seems to have been where there was clear evidence of physical attack or abuse, in which case the police seemed to treat the physical assault as the central issue.

In screening out cases, the police are influenced in their decisions by what they perceive to be the attitude of the crown on whether or not the cases could be successfully prosecuted. In turn, crown attorneys are unlikely to go forth with a case if in their judgement there is little likelihood of a conviction. The crown's opinion is influenced by the types of evidence available and necessary to get a successful prosecution. Hence, it is theoretically possible that even cases in which both the police and crown believe the complainant do not get to trial because of lack of "good" evidence.

The filtering process operates at three levels: first, when the victim decides whether or not to report a case; second, when the police designate a reported case as

founded or unfounded; third, when the crown attorney decides whether or not to lay charges. It appears that much of the research on the filtering process has focused on the criminal justice level. However, equally if not more important is the need to understand why victims often do not report a sexual assault to the police or, for that matter to anyone.

Renner et al (1988: 163) suggest that a key factor in the silencing of victims is the social victimization process which frequently occurs in cases of sexual assault. There is reason to believe that "victims of rape are often victimized again, after the assault, by social, medical and legal processes. Because of this, women who are sexually assaulted are frequently reluctant to receive medical attention, report the crime to the police, or even tell close friends and relatives, and they may experience some degree of self-blame and guilt over the assault".

To the extent that victims share the socio-cultural beliefs about rape, perpetuated frequently by the media, they are unlikely to see themselves as "legitimate" rape victims. Rather, they will tend to deny or suppress their experiences. As well, there are other considerations, including fear of publicity, the victim's perception of the criminal justice system and the trial process, as well as a sense that many charges result in acquittals or dismissals.

A central aim of the new provisions to the Criminal Code was to encourage women to report sexual assaults and to remove some of the secondary victimization experienced by complainants in the criminal justice system. Proponents of the new legislation hoped that substituting new offences and new labels and changing the special evidentiary rules associated with the crime of rape would eliminate some of the myths and stigma surrounding rape.

According to legal experts, there were four major evidentiary rules which made rape convictions difficult to obtain in the past. In addition, many argued that the victim's painful experience during the trial process stemmed from the procedures and attitudes which were associated with these evidentiary rules. All were related to the complainant's credibility and the issue of her consent. These rules were criticized by people for blatantly protecting the interests of men and perpetuating the myth that women who complained of rape were lying or fantasizing (Boyle, 1985). To prevent this "secondary victimization" and to increase reporting, founding, and conviction rates, each of these was subsequently abrogated or amended in Bill C-127.

The first of these issues was the doctrine of recent complaint whereby if the complaint was not recent and spontaneous, the judge was required to instruct juries that they could draw adverse conclusions as to the truthfulness of the complainant's testimony (Macdonald, 1982a). In other words, the complaint had to be made at the first reasonable opportunity after the alleged offence and could not be elicited by "leading, inducing or intimidating questions". As Stanley (1985: 40) indicates, the assumption was that if the victim of a sexual assault failed to raise the "hue and cry" her failure was

taken as a virtual self-contradiction of her testimony. The rule of recent complaint, which was inconsistent with rules of evidence in most other complaints, was criticized as "anomalous" and "arbitrary". In its comments on this rule, the Federal/Provincial Task Force on Uniform Rules of Evidence wrote that "the expectations of medieval England as to the reaction of an innocent victim of a sexual assault are no longer relevant ... there is no longer a logical connection between the genuineness of a complaint and the promptness with which it is made" (cited in Macdonald, 1982a: 4).

A second problem centered on the corroboration rule which required that before an accused could be convicted, corroborative evidence must exist to substantiate the victim's testimony (Stanley, 1985: 72). This meant that a victim's testimony alone was not sufficient for a conviction of rape, but rather had to be corroborated by a third party or by some physical evidence (e.g., torn clothing, bruises, other evidence of physical violence). The implication was that a rape victim's testimony was less credible than that of any other crime victim who testified on his or her own behalf. Behind this thinking was a deep mistrust of women, a fear of false charges and an assumption that jurors would be easily swayed by a complainant's testimony and, thus, presumably lose their objectivity in the case. Also, the belief that the victim might be lying encouraged the use of polygraphs and meant the victim was frequently subjected to a series of interviews and cross-examinations. Critics called the corroboration requirement excessively technical, unnecessary, anachronistic and discriminatory against rape victims.

A third rule of evidence which came under much criticism, especially from feminists and women's groups, was that relating to a complainant's reputation. Under the old law, evidence about the victim's previous sexual activity with someone other than the accused was considered relevant in both establishing consent and to the victim's credibility. There was an implicit assumption that promiscuity denoted dishonesty, and that if a woman consented to previous sexual activity she was likely to have consented on the occasion under question. The implication was that only certain kinds of women could be raped. As Donald Macdonald (1982b: 3) wrote, "the trial of a sexual offence had the potential of being, and often was, a humiliating and devastating experience for a complainant. She risked having her whole sexual life exposed to public view, often with thinly-veiled implications that her character was bad".

In 1976, the government amended Section 142 of the Criminal Code to restrict questions about the complainant's sexual conduct except when a judge determined at an in-camera hearing that the exclusion of such evidence would be harmful to the interests of justice. The new amendment, however, resulted in a major unintended and unanticipated consequence. Judicial interpretation of the new section extended even wider powers of cross-examination about a victim's sexual past to a defence counsel. In Forsythe v. The Queen (discussed in Stanley, 1985: 88) the court interpreted the amendment to mean that evidence of a complainant's previous sexual activity with other than the accused might be necessary to establish the credibility of the complainant. This meant in effect that "a provision intended to protect complainants has been turned into one which greatly enhances the position of the defendant" (Macdonald, 1982b: 6).

With Bill C-127, certain parameters have been set which limit the admissibility of evidence regarding previous sexual activity of the complainant. It was hoped that this change would reduce the potential for victim harassment during the trial process.

A fourth evidentiary issue came to the fore in 1980 when the Supreme Court of Canada ruled in Pappajohn v. The Queen that "theoretically, an unreasonable, yet honest, mistake as to consent could be an effective reply to a charge of rape" (Macdonald, 1982c: 1). In a rape trial, the prosecution had to prove that the defendant both had sexual intercourse and did so with a nonconsenting woman. The issue of consent was complicated by the evidentiary requirement of mens rea, or the guilty state of mind. It was decided that a person who honestly believed that there was consent should not be convicted (Macdonald, 1982c: 4). Although the reasonableness of a mistake could be taken into account in determining the honesty of belief, it was not required as a matter of law. Critics described the Pappajohn decision as a "rapist's charter" and saw it as another element in the judicial process which worked against the victim.

1.4 Major Changes in Bill C-127

For over a decade, "Canadian rape law has been the subject of debate in public, political and legal forums, and had been found lacking on both procedural and substantive grounds" (Osborne, 1984: 51). For example, rape only covered a narrow range of behaviour, and frequently it seemed that the victim's testimony was treated with scepticism and reserve.

The new sexual assault legislation, Bill C-127, was a synthesis of many viewpoints, and reflected the outcome of the discussions and compromises between the Law Reform Commission Report, Bill C-52 (introduced in 1978) and Bill C-53 (introduced in 1981) (Snider, 1985: 340). It was the culmination of a reform process which began officially with the establishment of the Law Reform Commission, and was influenced by pressures from liberal elements within the criminal justice system and the burgeoning feminist research and literature.

Critics had argued for the necessity of reforming the law because it was inequitable, discriminatory to women and, in some parts, antiquated. In addition, it was pointed out that standards of morality and sexuality had changed. Specifically, the atypical laws of evidence, discussed above, were condemned by feminists and others as being intimidating and degrading to the victim and the fact that a husband could not legally "rape" his wife was seen as another indication that women were viewed and treated as male property (Boyle, 1985). Together with low conviction rates and an articulate women's movement, these factors created a dissatisfied and increasingly powerful constituency calling for legal change (Snider, 1985).

In its 1978 report, the Law Reform Commission concluded that the rape laws were indeed prejudicial to women and did not reflect contemporary social attitudes (Macdonald, 1982d). The authors recommended that the Criminal Code sections on sexual offences be revised and that rape be seen as a crime of violence and aggression rather than passion. They advocated that the offences "rape" and "attempted rape" be replaced by two new indictable offences. Penetration would no longer be an essential component of either offence. The reforms called for by women's groups stressed equality before the law, recognition of the assaultive nature of the crime and more realistic and enforceable penalties (Kinnon, 1981: 43).

With Bill C-127, the narrow crime of rape was replaced with a tripartite scheme of sexual assault. The major changes contained in the bill pertaining to sexual assault are summarized below. (The following information is taken from Bill C-127; Macdonald, 1982a, 1982b, 1982c, 1982d; Snider, 1985; Vandervort, 1985.)

1. As recommended by the Law Reform Commission, nonconsensual sexual relations were redefined as assaults rather than crimes of passion. Prove of penetration was no longer required; instead the emphasis was on touching of a sexual nature without consent. The removal of penetration from the law was part of the attempt to emphasize the violent rather than sexual nature of the crime.

2. "Rape", "attempted rape" and "indecent assault" were abolished and replaced by sexual assault, a three-tier offence comprised of:

    a) a simple sexual assault (an indictable or summary conviction offence)

    b) sexual assault involving a weapon, threats to a third party or causing bodily harm (an indictable offence)

    c) aggravated sexual assault, in which a victim is wounded, maimed, disfigured, or whose life is endangered (an indictable offence liable to life imprisonment).

    The levels are differentiated according to the degree of violence used or threatened and the risk to the victim, rather than the nature and extent of sexual intimacy.

3. The new law is gender neutral. Unlike rape, sexual assault, is not confined to male-female behaviour. Persons of either gender may be charged with sexual assault.

4. There is no longer any spousal immunity. Spouse are competent and compellable witnesses against one another in all sexual assault cases.

The unique evidentiary requirements in sexual assault trials and convictions were changed.

5. The doctrine of recent complaint was eliminated.

6. The requirements of corroboration were abolished. A judge is no longer allowed to tell the jury, if there is one, that corroboration is desirable.

7. Questions about the complainant's previous sexual activity with someone other than the accused were forbidden except under three narrow circumstances.

8. The defence that if the defendant really believed the complainant was consenting, however mistaken and unreasonable that belief, he would be acquitted was altered. It is retained in Bill C-127 as theoretically available if there is sufficient evidence to support such a defence. But the trier of fact, judge or jury, is to consider whether there are "reasonable" grounds for this belief in order to assess the honesty of the belief.

It was hoped that the changes would have far-reaching and significant impact on the outcome of sexual offences. With the new legislation, the emphasis was to be on the harm done to the individual rather than to the sexual morality of the incident. "By focusing on the degree of harm rather than on the intimate nature of the offence,..the bill removes some of the hurdles that make it difficult for rape victims now to report the crime" (Lipovenko, 1982: 19).

In general, support for reform was positive and viewed as a major step forward in bringing rape law into the twentieth century (Macdonald, 1982d). As Faye Campbell, a lawyer for the Department of Justice Canada put it, "There is a stigma about rape. Everyone in the system - the police, the judges, the juries - has classically said rape laws imply that the victim must have done something to bring the assault on herself. But if the same offences apply to men and women...maybe some of the myth and stigma will disappear" (quoted in Lipovenko, 1982: 19). In other words, when the rape law was substantially altered in 1983, Canadian women appeared to have made a positive legal advance (Dawson, 1985).

The majority of women's organizations supported desexualizing rape, that is removing it from the category of sexual offences and reclassifying it as an assault. However, some feminists (e.g., Cohen and Backhouse, 1980) were critical of the move. Their argument was that rape is fundamentally different from assault. Rape, they argued, was unlike other assault crimes in that it is directed at the core of women's sexuality. Furthermore, many women who have been raped do not define it as assault,

and this should not be ignored in the legislation. Also, they suggested that "lower penalties speak loud and clear to society that the crime is no longer as serious as it once was" (Cohen and Backhouse, 1980: 103).

1.5 Implications of Bill C-127

It appears that two fundamental principals formed the basis for reform: 1) increased protection for the dignity and inviolability of the person, and 2) the need to bring the law in compliance with the equality provisions of the Charter of Rights and Freedoms. An implicit goal was to remove the stigma surrounding rape, to encourage more women to report sexual assault and increase the number of charges and convictions of sexual assault.

In other words, the new sexual assault legislation was to have an impact on both the victim and the criminal justice system. However, as Christine Boyle (1985: 98) has pointed out, Parliament has not anticipated every issue nor provided all the answers in Bill C-127. Major areas have been left for judicial interpretation. For example, while the term "assault" is elaborated on in the new law, the term "sexual" is not defined. It is, therefore, not clear what factors will transform assault into sexual assault. There are several different ways that "sexual" could be interpreted: by using a dictionary or shopping list approach (i.e., listing those parts of the body of a sexual nature) or by attempting to specify conditions, for instance, "an assault is sexual if it: (i) has a sexual motivation; or (ii) occurs in circumstances involving sexuality; or (iii) has an 'aura of sexuality' (Boyle, 1985: 98-99).

The implications of this definitional ambiguity were brought to light in the R. v. Chase case in New Brunswick. Here the accused grabbed a 15 year old female by the arms, shoulders and breast, saying something to the effect, "come on, I know you want it". The legal question was whether he was guilty of sexual assault or simply assault (Boyle,1985: 100). The trial court (Provincial Court) in 1984 found him guilty of sexual assault, but on appeal the New Brunswick Court of Appeal ruled that touching of the breasts did not constitute a sexual assault. In its reasoning, the appeal court held that a sexual assault required an attack involving a person's genitals and did not include such secondary sexual characteristics as breasts. This decision was appealed to the Supreme Court of Canada, which in 1987 overturned that decision. The Supreme Court held that a sexual assault is one committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. (Telegraph-Journal, Oct. 17, 1987: 12).

There is also the issue of interpretation. The intent of those who wrote the law is not necessarily shared by those who interpret or experience it. "The makers of the law may have one general interpretation of the law, whereas enforcers experience it in a different way, and those of us who use the law for various purposes experience something quite different again" (Heald, 1985: 121). Such differences could well become

a reality in the application of the new evidentiary rules. The example of the court's ruling in Forsythe v. The Queen is a case in point.

In addition to the above mentioned concerns, there has been some criticism of the new legislation. Parker (1983: 317), for example, writes: "This mini-Code is not very well thought out. There is a sloppiness about these provisions; they resemble a jigsaw puzzle made with a saw with some of the teeth missing ... Bill C-127 has a hodge-podge quality about it". Boyle (1985), while generally supportive, raises questions about making sexual assault a gender neutral crime. In her view, "the insistence on a gender neutral assault law causes considerable difficulty in thinking about the meaning of the term sexual" (104). Other feminists would also argue that making the crime gender neutral does not change the reality that it is men who assault and exert control over women. "Sexual assault is a gender-based assault on women and a statement of male expectations of women's accessibility" (Dawson, 1985: 40).

While not questioning the usefulness or desirability of the changes brought about by Bill C-127, there is another more fundamental issue which has been raised concerning the impact of the legislation: to what extent can a change in legislation fundamentally alter the social conditions which give rise to sexual assault? As Heald (1985: 117-119) points out, throughout the long debate over the drafting of the legislation, no one actually said that the goal is less (or no) rape or sexual assault. Rather, the focus was on obtaining the maximum number of convictions. Similarly, feminist Barbara James (1982: 71), states: "The reform proposals do not consider or challenge the pervasive system of violence and power that exists in society".

It must be remembered that law is a social creation and the legal system is an institution within society which mirrors societal values at any given point in time. While changes in legislation may legitimate certain practices or symbolize new attitudes, fundamental changes in the legal system cannot be achieved in isolation from other societal changes. "The law itself ... does not constitute but reflects and contributes to larger problems which law alone cannot, therefore, change" (Heald, 1985: 121).

Thus, while it may be true that men don't stop raping because the laws have changed, it can be equally argued that "as long as we live in a society in which law is considered the only avenue for controlling sexual assault, efforts to make the law more consistent with reality as women experience it are vital" (Heald, 1985: 121). It is precisely this that the new legislation attempted to achieve. Whether it is successful remains to be seen.

Until the current evaluation commissioned by the Department of Justice Canada, of which this report is a part, there had been little research of a comprehensive nature which attempted to assess the impact of the new sexual assault legislation. However, there are a couple of studies which are useful to review. Renner and Sahjpaul (1986) used Statistics Canada data to determine whether the number of sexual assaults in proportion to the number of physical assaults reported to the police, charged and

cleared during the first year of the legislation had, in fact, increased over the previous 10 year period. They concluded that there was no substantial change.

Using as his basis the impact of rape legislation reform in other countries, Chappell (1984) concludes that the immediate impact of the reforms may be perceived as slight, if the sole measurement is criminal justice statistics. He questions whether the reporting and conviction rates will, in fact, increase, or whether they will simply mean that the labels for the various offences have changed. That is, "there is a real likelihood that the mousetrap being constructed in Canada will be no bigger than the old model -- the same pool of rapists will be caught in the trap, but instead of being convicted of rape, or some lesser offence, they will now be convicted of one of the three categories of sexual assault" (Chappell, 1984: 75).

Chappell also suggests that, based on evidence from other jurisdictions, the new procedural and evidentiary rules may, in practice, offer less protection for the victim than supporters of the new legislation claim. In his view, those involved in the adjudicative process will continue to apply "consent tests" based upon highly ingrained values and ideologies, at least for the foreseeable future.

Loh's empirical study on the impact of rape law reform in Washington State found no change in the overall rates of convictions and pleas and no change in the overall rate of charging (Loh, 1981). In this "before and after" study, he found a basic uniformity in rape patterns and profiles of victims and offenders in the two time periods. While the number of rape convictions increased with the new reforms, "this does not mean that the total pool of offenders has expanded, only that within it there is more precise labelling. The new statute, then, is not a bigger mousetrap, only a better mousetrap. It is a truth-in-criminal-labelling statute" (Loh, 1981: 37).

The fact that changes in legislation do not necessarily achieve their stated aims immediately does not render them meaningless. For, according to Chappell (1994: 77), the long term impact of the reforms could be profound in that the reforms symbolize "the response of the nation as a whole to the status of women". Given the long standing myths and prejudices about sexual offences, it may be unreasonable to expect major gains in the short term. Reform, however, creates a climate for change. Its function as a catalyst for attitude change may be greater than its immediate impact on the criminal justice system. Criminal law "has a 'moral or socio-pedagogic' purpose to reflect and shape moral values and beliefs of society....The new rape law symbolizes and reinforces newly emerging conceptions about the status of women and the right of self-determination in sexual conduct" (Loh, 1981: 50).

1.6 Evaluation Objectives

The effectiveness of Bill C-127 will depend, ultimately, on the attitudes of criminal justice personnel, the victims and the public in general. For, in the words of Judith Osborne (1984: 63), "The real impact of legislative change depends on how it is interpreted or applied in practice". Since it is reasonable to assume that the law is experienced differently, the views of the different segments of the criminal justice system and the victims must be taken into account in any evaluation.

The object of this evaluation was to provide information on both the practice of the new legislation, as well as the intended and unintended consequences. Thus, one goal was to describe how the new legislation had been implemented and how it has been interpreted by the key actors. For example, a professed intention of the new law was to shift the focus in sexual assault from sexuality to violence. Yet, as we saw, there appears some definitional ambiguity here. Therefore, we need to know how the courts have interpreted what is meant by "sexual". Also, how has the shift affected the filtering process of complaints at both the police and victim level?

Furthermore, we need to determine the number and percentage of cases which fall under each of the three tiers of sexual assault. We need to understand what sorts of arguments are put forward by both defence counsels and crown attorneys in sexual assault cases. We need to establish what 'aggravating' and 'mitigating' factors judges take into consideration during sentencing. We also need to determine whether victims are afforded more protection under the new legislation.

A second set of questions was concerned with whether the legislation has affected changes in practices, procedures and outcomes in the criminal justice system, as well as the victims' experience with these changes. For example, does the pattern of enforcement of the new provisions differ significantly from that of the previous one? Have the attitudes toward victims of sexual assault been altered?

One basic thrust of the legislation was to improve the methods of apprehending those who commit sexual assault. One obvious question is whether the number of complaints, charges laid and convictions of sexual assault have increased. The law was changed partially because victims were seen as reluctant to go to court because of the process involved. From the victim's standpoint, the main objective of the changes is to increase confidence in the justice system, to reduce the sense that it is the victim who is on trial, and to make it possible for the victim to take a more active role in the case (e.g., the decision to allow one of the victims of a recent sexual assault in Toronto to sit through the whole trial was seen by the victim as an empowering experience). Thus, another major concern is whether the complainant feels the new procedures and evidentiary rules are equitable and nonthreatening.

Have victims' perceptions of the process changed and, if so, how? And, objectively, how has the process itself changed?

The new legislation is both gender neutral and extends protection to spouses. We thus need to determine whether the attributes of the victims has changed. And, we need to examine the impact of the changes on victims of spousal assaults.

The intent of legislation and the reality of its' social impact may sometimes differ. This issue formed our third concern.

Negative, unintended consequences, for example, can seriously undermine the basic intent. Has the 'desexualizing' of sexual assault meant that the offence has become more trivialized, as some critics feared it would? Do lower penalties also have the effect of depreciating the seriousness of the offence? Has "sexual" been interpreted by the courts in such a way as to negate the experience of the assault? Does the new law result in such low sentences or so many summary convictions that victims feel it is not worthwhile to press charges? Have the new evidentiary laws on the admissibility of evidence in cases of sexual assault in any way backfired? Has making the law gender neutral undermined the secondary status of women in our society?

These are only examples of the types of questions addressed in this evaluation. It is not possible, as we discuss in Part 2, to address fully all of these questions on the basis of data gathered from only one or two research sites. To fully understand how the new legislation is working, we need the combined findings from all evaluation sites. We also need to keep in mind, based on research findings in the United States (see Loh, 1981), that the real impact of legislative reform may not be readily quantifiable in statistical terms.

1.7 Organization of this Report

This report is divided into six sections. The first section outlines the issues that led to the development of Bill C-127 and the outcomes various advocates anticipated from this particular reform. The second section outlines the research design used in this evaluation and the limitations of the data available to us in carrying out a full-fledged evaluation of Bill C-127. Again, we do so briefly because part of our mandate was to replicate the research design and research instruments that are used in other evaluations of this legislation.

Because this evaluation is intended to draw upon several quite different data sources, the basic findings of each are set out separately in sections 3 and 4. The fifth section of this report does two important things. First, it describes what we learned from victims about their experience with the criminal justice system. And, second, we outline what was learned from observing the few sexual assault cases that, over the period of this research, went to trial. The sixth and final section presents a general synthesis of these findings and our conclusions about the impact of Bill C-127 as it has affected the treatment of sexual assault in these two New Brunswick jurisdictions. Part of our mandate was to carry out a content analysis of newspaper reporting of sexual

assaults, not only in New Brunswick, but generally, at least to the extent that they are reported in the newspapers available to the New Brunswick population.

2.0 RESEARCH DESIGN AND DATA SOURCES

2.1 Research Design

This portion of the evaluation of Bill C-127 is concerned with sexual assault cases in two New Brunswick jurisdictions, Fredericton and Saint John. As part of a larger study, we have attempted to replicate the logic of the overall research design, the same five research components and, to a considerable extent, the same research instruments and coding frames.

A major objective of the evaluation is to determine whether there are changes in criminal justice system attitudes and practices and in victim's experiences with the system which can be directly attributed to the implementation of Bill C-127. As described in our original proposal, the underlying model is the classical experimental design. But, since the legislation was implemented in all jurisdictions in Canada, there is no control group -- no group of victims -- which has not been affected by the legislation. As the way around this problem, the evaluation approximates the experimental model by "before" and "after" comparisons.

Throughout, and wherever practicable, we are comparing the situation and outcomes prior to Bill C-127 and in the years since the legislation came into force. In some analyses, 1983, the year the legislation came into force, is treated as a "transitional" year.

But as also noted in the original proposal, the evaluation is based on before and after measures of different groups of victims and, in some cases, different actors in the criminal justice system. It is quite possible that differences which are observed are a result of other kinds of changes in Canadian society and Bill C-127 was, itself, a reflection of, rather than a cause of these changes. It is frequently argued that legislation lags behind public opinion and attitudes and that substantive and procedural change only becomes politically possible after there has been a substantial shift in the public's attitudes and perception of the issue.[1] In other words, in the absence of a truly experimental design in which, as well as before and after measures, there is also a control group not exposed to the test factor, causal inferences must always be viewed as tentative.

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[1] At the same time, it can also be argued that legislative change makes it easier to actualize, to put into practice, these newer ideas.

2.2 Research Components

As in the other evaluations, this research is based around five research components. While each was intended to generate data of interest in its own right, the more general expectation was that, in the end, these data sources should coalesce to provide a many sided summative evaluation of the sexual assault legislation. In the sections which follow, these components are briefly described. We begin, however, with more general comments on the nature of the data available to us in the evaluation and its limitations.

2.2.1 Data Limitations

This research has taken place within the context of a rather remarkable set of changes in the concerns and priorities of those who deal with sexual assault cases. In the 1970s and early 1980s, when the previous legislation was under attack, the main concerns centered on how women who had been raped or in other ways sexually assaulted were treated by police, courts and defence lawyers whose role was to defend those accused of these offences. A major objective of this legislative reform was to make it easier for women to report a complaint and to smooth the path through the criminal justice system. Bill C-127, though dealing with a unique and difficult kind of crime against the person, was very much within the more general concern of the time with the whole area of victimization and "victim's rights."

Our mandate has been to explore, using various data sources, whether women are better off as a result of the new legislation. Yet, our most vivid impression both from the files and from our interviews with various kinds of key informants, is that the focus has shifted rather dramatically away from sexual assault between adults to cases involving children, usually, but not exclusively, of an incestuous nature. As will be described in more detail in a later section, the police records as well as the rape crisis centre files do not suggest a heightened awareness of adult sexual assault. While such assaults are happening, they are not reported in great numbers by women in the two jurisdictions included in this study. Nor has there been change in the gross number of complaints made to the police. Without knowing the total extent of incidents, we cannot know whether there has been a change in reporting levels, but it seems reasonable to suppose that the actual level of sexual assault incidents has not changed.

What is apparent, however, is that judges, crown prosecutors and defence lawyers have considerable difficulty thinking at all about adult sexual assault cases; it is as if these have ceased to occur which is hardly the case. All had to be reminded that we were not there to talk about child cases but adult cases and as many thought about their experience in recent years they came to realize what a low priority the latter had become in the face of the overwhelming pressures to do something about sexual abuse of children. Simply, over the course of this legislation coming fully into force, the "in" issue has shifted from sexual assault between adults to protection of children from

adults. We have been studying a phenomenon which though a burning issue a few years ago, is no longer seen as interesting or worthy of comment as it was a short time ago.

2.2.2 Criminal Justice System File Analysis

Because of its promise to offer the most systematic and objective data, the core of the evaluation has been the analysis of police and court records for the two years prior to Bill C-127, for 1983, which we have viewed as a "transitional" year and for the four years following the legislation coming into force. Initially this study was to be limited to Fredericton. However, the relatively small size of this jurisdiction and the limited data base available necessitated our extending the research to include Saint John. As well, data collection was extended beyond the two city police files to include RCMP files if these cases were to be tried within the two jurisdictions.

The present evaluation is confined to an analysis of police and court data for cases in which the victim was 16 years of age or over at the time of the incident. This is a result of a decision within the provincial Department of Justice to undertake a separate study of cases where children have been victims of sexual assault and abuse. Expanding the evaluation to include both Fredericton and Saint John and to examine RCMP files as well as those of the police in the two cities resulted in there being, in total, 212 cases over the seven years for Fredericton and six years for Saint John included in this evaluation (87 and 125 cases respectively). And, at the crown prosecution level, this figure is reduced to some 72 cases.

As is often the case, information collected for administrative and legal purposes is not necessarily suitable for social science and evaluation purposes. For example, theoretically important data such as indicators of social class of the victim may be viewed (perhaps, appropriately) as irrelevant by police and is not systematically recorded. The greatest gap is in what happened at the trial proceedings. While the instruments regarding crown prosecution and court records we were asked to replicate contain a considerable number of questions about trial proceedings, these are, unless there is an appeal and a resulting request for a transcript of the trial, essentially lost to history. That is, neither the crown attorney's office or the criminal courts have a written record of what happened during the vast majority of trial proceedings.

We have included all of the adult sexual assault cases for the three time periods. Thus, tests of statistical significance have, for the most part, no meaning. What is reported here cannot be generalized to some larger population because this is the population or census of cases which have been reported to the police over the past several years. The data must then be viewed within the context of the other evaluations, most of which also suffer from a paucity of cases and incomplete data. Together, these studies may answer the basic questions of this evaluation; individually, none can offer definitive conclusions about the consequences of the legislation and changes which have occurred over the past five to six years.

2.2.3 Rape Crisis Centre File Analysis

Given the contention that a large proportion of sexual assault victims do not report the incident to the police, it was necessary to collect data on cases that have been reported to The Fredericton Rape Crisis Centre (there is no centre in Saint John). Since most victims who call the rape crisis centre expect that it is done in confidence, it was agreed that the data would be coded by volunteers at the centre and we would receive only the coded data. As shown in more detail in the third section, the centre does not ordinarily record much information on the victim or the circumstances of the complaint or have not done so systematically. In all, there are 140 cases available for analysis but considerably high levels of missing information for many of the variables included in the coding frame.

2.2.4 Interviews with Informants in the Criminal Justice System, Rape Crisis Centre and Related Agencies

It was recognized in the original research design that while police and court records can provide us with basic statistics on sexual assault, the assessments and perceptions of those who (in varying capacities) deal with sexual assault provide another very important data source in the assessment of the impact of Bill C-127. The interview schedules were structured around a basic set of questions given to everyone with additional questions (or deletions) in order to address the different functions of the informants and the role and perspective from which they are able to assess the processing of a sexual assault case. Over the course of this study we have interviewed police, crown attorneys, judges, and victim witness workers in both Fredericton and Saint John and defence lawyers both in these two jurisdictions, but also in one other jurisdiction in the province. In addition, we have interviewed some of the present volunteers at the Fredericton Rape Crisis Centre as well as two medical doctors. The list of these informants and numbers interviewed is summarized in Table 1.

Table 1 Number of Interviews with Informants

Defence Lawyers	8
Crown Attorneys	9
Judges	9
Police	13
Victim Witnesses Workers	2
Rape Crisis Centre Volunteers	4
Medical Doctors	2

2.2.5 Court Observation Study

One research component was to observe cases that went to trial. While we do report on four such cases and one Court of Appeal case, as in other criminal matters, most accused plead guilty, this resulting in no trial to observe. Given the seriousness of the crime, this was not anticipated. However, as the criminal justice system study shows, there are extremely few adult cases in the two jurisdictions that would have been classified as rape or attempted rape under the previous legislation. Thus, for many sexual assault cases, the crown counsel chose to proceed under a summary, rather than an indictable conviction, increasing the likelihood of the defendant pleading guilty.[2]

2.2.6 Victim Study

Critical to an evaluation of the legislation are the views and assessments of the victims of sexual assault. However, as is described in more detail in the fourth section, it was apparent from the outset that there would be both logistical and ethical problems in contacting the victims and a reluctance to be interviewed. Moreover, it was viewed inappropriate to attempt contact with victims whose case happened several years ago.

Our main source of respondents came from victim witness workers who, on our behalf, contacted individuals who they had assisted and asked whether they would consent to an interview. In addition, through the use of posters and an appeal through the local media, victims of sexual assault (whether or not they had reported it) were asked to contact the research team (a special telephone number and answering machine was used). Despite these efforts, it was only possible to interview 17 victims of sexual assault. These interviews were conducted by one of the senior female members of the research team.

2.2.7 Newspaper Content Analysis

Over the course of this evaluation, the full-time research assistant systematically went through the Globe and Mail (National edition), The Telegraph Journal and The Daily Gleaner and clipped stories and articles pertaining to sexual assault.

We turn, in the third section to an analysis of the files relating to the criminal justice system and those generated by the rape crisis centre.

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[2] For some accused there may not have been much choice. Criminal legal aid is not ordinarily available to those who are not likely to lose their liberty or livelihood as a result of a conviction.

3.0 FILE ANALYSIS

3.1 Introduction

This section presents an overview and general description of the characteristics of victims, offenders, the kinds of offences and the processes and procedures experienced by those lodging a complaint about a sexual assault. Its main objective is to present an overview and summary of sexual assault cases from 1981 to 1987 in Saint John and Fredericton. The data are generally broken down into three time periods: the two years prior to Bill C-127, 1983, viewed as a transitional year and 1984 to 1987, the years after Bill C-127 came into force. At this point, the various parts of the criminal justice system file analysis are examined separately. At a later point, these are synthesized to give a general picture of sexual assault in these two New Brunswick jurisdictions. We begin with a description and analysis of data from the police files for the two jurisdictions.

3.2 Police File Analysis

3.2.1 Types of Offences

Prior to Bill C-127, those accused of a sexual offence were generally charged under one of several categories. The most usual seems to have been s. 143, rape, sometimes reduced through "plea bargaining" to s. 149, indecent assault. In addition, offenders could be charged under s. 146 or s. 148, sexual intercourse with a female under fourteen years of age or one who is feeble minded. Indecent assault by a male against a male was covered under s. 156 of the Criminal Code.

As noted earlier, the present research excludes from analysis, sexual offences involving victims under 16 years of age. Thus, in 1981 to 1982, police charges are fairly evenly divided between s. 143 and s. 149, (44 per cent and 46 per cent, respectively). In contrast, 93 per cent of the cases in 1983 and 85 per cent of those in 1984 to 1987 are classified as s. 246.1, simple sexual assault. Indeed, only five of the 128 cases dealt with in the latter period were classified under the second two tiers of the provisions (Table 2). As the bottom panel of Table 2 indicates, in the majority of cases there were no other charges laid against the offender.

As can be seen in Table 3, victims have come to the police with a number of types of complaints. Sexual intercourse, actual or attempted, is the basis of the complaint in approximately one-third of the cases. This is evident over the three time periods. However, a major difference appears in 1981 to 1982, in almost one-half of cases, the complaint was one of touching, grabbing and so on, whereas in the latter two periods only 23 per cent and 22 per cent respectively fall into this classification. Another difference, observed in Table 3 is that in the post legislative period a somewhat larger proportion of cases involve more than one kind of sexual contact and, as the

"other" category suggests, there are more cases which are not easily classified into specific categories. Closer inspection of these cases shows alleged incidents ranging from exposure of penis and obscene invitations to two or three cases where the victim is not sure what happened, whether, in fact, there had been per•tration.[1]

Table 2 Classification of Offences by Time Period

(Percentage Distribution)

Type of Offence	Time Period: Before	During	After	Total
s. 246.1	-	93	85	65
s. 246.2	-	-	2	1
s. 246.3	-	-	2	1
s. 143	44	-	2	12
s. 149	46	-	2	13
No Sexual Assault	10	7	8	8
Numbers	(52)	(27)	(128)	(207)
Second Offence				
No Other Offence	81	93	91	89
Break and Enter	6	-	1	2
Common Assault	6	-	5	5
Other	7	7	3	5
Numbers	(53)	(29)	(130)	(212)

As noted, victims come to the police with a variety of complaints. The following are illustrative of these:

- attempted to remove victim's top;

[1] For example, one victim awoke in her bed to find a man on top of her moving up and down. He had ejaculated over the sheets and her nightgown but it is not clear that there had been penetration. In a few cases, the victim fell asleep at a party and, again, woke to find a man in bed with her. In at least one case, the police believed that the victim had been raped but she maintained that she had only been mugged and would not cooperate.

- naked man ran at victim screaming obscenities and "suggestive lewd things";
- unknown male followed victim; made indecent remark and exposed his penis;
- he had his hand down squeezing inner part of her thigh;
- grabbed and tore buttons off her dress;
- tore her clothes off. The culprit was unable to have any sexual contact with her;
- exposed his penis and asked victim to suck it;
- offender was on top of victim and hitting her on the head;
- attempted to remove victim's slacks.

Table 3 Type of Sexual Contact by Time Period

(Percentage Distribution)

	Time Period			
Sexual Contact	**Before**	**During**	**After**	**Total**
Genital Intercourse	33	27	33	32
Attempted Intercourse	2	-	3	3
Fellatio	2	-	2	2
Anal Intercourse	-	-	2	1
Touching/grabbing	48	23	22	28
Masturbation	-	-	4	3
Insertion of Finger	2	4	-	1
Other	2	36	15	14
More than one	10	9	20	16
Numbers	(48)	(22)	(116)	(186)

3.2.2 Characteristics of Offences

According to police records, a weapon was involved in about 14 per cent of reported cases. In the large majority, 18 out of 21 (86 per cent), the weapon was a knife. In only two cases over the years included in this evaluation does a gun appear to have been used by an offender. At the same time, victims do report physical force as having been used in just over 59 per cent of cases and verbal threats in about 48 per cent of cases. As Table 4, indicates, there are some but not patterned differences over the three time periods. Most victims are reported to have put up some resistance either verbally or physically. Finally, it can be noted that in the vast majority of cases (90 per cent) one offender was involved in the incident.

Table 4 Characteristics of Offences by Time Period

(Percentage Distribution)

	Time Period				
Characteristics	**Before**	**During**	**After**	**Total**	**n**
Physical Force	67	42	59	59	(94)
Verbal Threats	62	31	44	48	(47)
Victim Injuries	59	29	28	36	(54)
Appeasement of Victim	7	10	21	16	(10)
Resistance by Victim	92	83	92	90	(113)

Information on whether the offender and/or victim had been drinking or using drugs is recorded for 48 per cent and ten per cent of cases, respectively. Where mention is made of alcohol use, it appears that 71 per cent of offenders and 56 per cent of victims were drinking at the time of the incident.

3.2.3 Temporal Patterns of Sexual Assault

Predictably, most sexual assaults occur either in the evening (45 per cent) or in the "small hours" of the morning (27 per cent). It might be anticipated that more offences would occur on weekends than weekdays. But, this is not borne out by these data: modal days are, in fact, Wednesday (19 per cent) and Thursday (16 per cent). The

distribution of cases over the seven days does not, however, differ significantly from what would be theoretically expected (Chi-square = 8.81; $p > .20$).

Table 5 Distribution of Sexual Assault Offences by Day of Week and Time Periods

(Percentage Distribution)

	Time Period			
Day of Week	Before	During	After	Total
Sunday	14	4	14	12
Monday	8	26	16	15
Tuesday	16	18	6	11
Wednesday	27	11	18	19
Thursday	10	22	17	16
Friday	10	11	13	12
Saturday	16	7	17	15
Numbers	(51)	(27)	(108)	(186)

There do appear to be some, though not patterned differences by month (Table 6). That is, reported cases are not evenly distributed over the 12 months of the year and, in fact, differ significantly from what would be theoretically expected (Chi-square = 26.07; $p < .01$). While this might, at first glance, seem to suggest a kind of Durkheimian theory about level of social interactions and level of deviant acts, grouping the months into "hot", "cool" and "cold" results in approximately one-third of cases falling into each "season". In other words, sexual assault seems as likely to occur in the summer as in the winter.

Table 6 Distribution of Sexual Assault Offences By Month for Time Periods

(Percentage Distribution)

Month	Before	During	After	Total
January	4	10	8	8
February	17	7	8	10
March	4	10	5	6
April	6	7	2	3
May	6	3	8	7
June	10	10	11	11
July	8	7	9	9
August	13	17	14	14
September	4	21	12	11
October	21	7	5	10
November	4	-	10	7
Decembery	4	-	3	2
Not Applicable	-	-	5	3
Numbers	(52)	(29)	(117)	(198)

As indicated in Table 7, sexual assaults take place in a variety of physical contexts. The modal location is the victim's residence, but this is followed by those in the 'public street/place' category and in the 'other' category that encompass a number of locations: bars, clubs, parties, student residences and so forth. The police records also indicate that there is a somewhat greater geographical concentration of sexual assaults in Fredericton than in Saint John (Table 8). Thus, over 50 per cent of reported assaults took place in either downtown Fredericton or "across the river" on the north side. In contrast, reported cases in Saint John are fairly evenly divided over four of the five areas of the city. These differences may be a reflection of the greater degree of residential segregation by social class in Fredericton than in Saint John. The latter city is more uniformly working class with middle and upper classes working in but often living outside of the city. As with the specific place of the offence, there are no apparent or patterned differences over the three time periods.

Table 7 Place of Offence

	Per cent	Number
Place		
Victim's Home	24	49
Offender's Home	12	25
Other Residence	5	11
Vehicle	13	27
Public Street/place	23	46
Other	21	42
TOTAL		(200)

Table 8 Geographical Location

(Percentage Distribution)

Fredericton	Per cent	Saint John	Per cent
Downtown	30	S.J. East	22
Northside	20	S.J. Centre	22
Uphill	12	S.J. North	19
University	8	S.J. South	29
Suburb	8	S.J. West	8
Reserve	4		
Rural	19		
Numbers	(102)		(90)

The activity of the victim preceding the sexual assault was also recorded. Table 9 sets out the various possibilities. In 25 per cent of cases, the victim was at home and, in 26 per cent of cases, the incident occurred while out walking. What is most surprising from Table 9 is that while much has been made of "date rape", if it is occurring, women are not reporting it to the police. And, while women hitch hiking would seem at high risk of a sexual assault, a small minority (six per cent) of cases reported to the police arose out of this circumstance.

Table 9 Activity Preceding Sexual Assault

Activity	Per cent	Number
At Home	25	49
Walking	26	51
Party	4	7
At Bar or Club	11	21
On Date	1	1
At Work	2	4
Hitchhiking	6	12
Public Transport	1	1
Visiting	9	18
Other	17	33
TOTAL		(197)

Overall, some 50 per cent of those lodging a complaint with the police claimed that the offender was a complete stranger while another 17 per cent described the assailant as an acquaintance (someone they knew vaguely or had "seen around", a likely possibility in these relatively small communities). For reasons which are not entirely clear, it appears that prior to the legislation those reporting to the police were somewhat more likely to be those who did not know the alleged offender than is now the case (Table 9). Prior to the legislation, slightly over 80 per cent of victims reporting to the police did not know the assailant or had little knowledge of him. This proportion falls to 60 per cent in the period after the legislation. It is evident that, at present, victims who know their assailants, often intimately, are reporting sexual assaults to the police more frequently than was the case in the earlier period. What is not clear is why the proportion of "stranger assaults" in the police files has fallen, and why this is the opposite of the phenomenon found in the rape crisis centre files. Finally, there is some difference in the likelihood of there being a witness or witnesses to the assault. Police records indicate that in about 22 per cent of cases, in the period before the legislation, there is one or more witnesses. In the period after the legislation, this has fallen to just under nine per cent.

Table 10 Relationship to Offender by Time Period

(Percentage Distribution)

Relationship	Time Period			
	Before	During	After	Total
Stranger	62	67	42	50
Acquaintance	20	11	18	17
Friend (present, or past)	2	4	10	7
Family Member	10	0	17	13
Other	6	19	14	12
Numbers				

3.2.4 Victim Characteristics

Under s. 143 and s. 149 of the Criminal Code, only women could be victims of rape or indecent assault. The gender neutral language of Bill C-127 has made it possible for women to be charged with sexual assault and for men to be victims. While the former has yet to occur in the present two jurisdictions, there have, in the years since Bill C-127 came into force, been 12 cases (9 per cent) where the victim lodging the complaint is male. It remains the fact, however, that the vast majority (91 per cent) of complaints are by women against men.

Excluding victims under 16, police records indicate that the majority of victims of sexual assault are between the ages of 16 and 24 (Table 11). In the years following Bill C-127, there is a slight tendency for people in older age groups to have made a complaint to the police. This is also reflected in the finding that there is a moderate increase in the proportions of married or formerly married women who have reported a sexual offence to the police. Whereas in the years prior to Bill C-127, some 85 per cent of complaints were by single women; this figure dropped to 77 per cent in the period following the new legislation.

Table 11 Age Categories of Victims by Time Period

(Percentage Distribution)

Age Category	Time Period: Before	During	After	Total
16 - 19	56	40	42	45
20 - 24	27	25	19	22
25 - 29	9	10	17	14
30 - 39	7	25	13	13
40 and over	2	0	9	6
Numbers	(45)	(20)	(107)	(172)

The literature on rape and sexual assault suggests that one of the factors predisposing police to decide whether a complaint is founded is the socio-economic status of the victim. That is, other things being equal, the higher the social status of the complainant, the more likely she or he will be believed and the case taken seriously. As mentioned, information on occupation and education -- the usual indicators of social and economic status -- is not, in most cases, recorded in the files. Thus, there are occupational data for approximately 29 per cent and educational data for approximately 16 per cent of cases.[2] Comparisons for the three time periods do not suggest that there has been any changes in recording practices. The data that does exist, or can be inferred, indicates that some 47 per cent of victims are students; the remainder are employed in relatively low paid occupations or are unemployed. Given that most victims are under 25, it is likely that these proportions are fairly representative of the total population of victims.

3.2.5 Offender Characteristics

Information is doubly limited for alleged offenders. A suspect was apprehended in only 49 per cent of cases. Basic background data are recorded for less than one-half of the men in this group. It can be noted that while average age is 38, unlike their victims, sexual offenders come from a variety of age groups (Table 12). It appears that approximately 42 per cent are single, another 15 per cent are separated or divorced and 42 per cent are married or cohabitating. At the time of the offence, one-fifth of apprehended offenders were employed in a white collar occupation and another one-fifth were students. About one-quarter were unemployed and the remainder worked in blue collar occupations. Finally, police records indicate that 71 per cent of apprehended offenders had a previous record of one or more criminal offences.

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[2] Most of this was inferred from victims' testimony.

Table 12 Age Categories of Offenders by Time Period

(Percentage Distribution)

Age Category	Time Period: Before	During	After	Total
16 - 19	8	29	10	12
20 - 24	42	14	20	25
25 - 29	4	29	10	11
30 - 39	15	29	28	25
40 and over	31	0	33	28
Numbers	(26)	(14)	(61)	(101)

3.2.6 Reporting Process

One of the important changes included in Bill C-127 is the abrogation of the need for judges to instruct juries about the recency of the complaint. At first glance, data in Table 13 suggests there is, in the minds of those reporting a sexual assault, less urgency about reporting an offence within 24 hours of the incident. However, careful inspection of the "other" category suggests that, in recent years, there has been an increase in the number of cases that are essentially incestuous. Typically, these victims are reporting a long history of abuse and sexual assault and not an incident. Our reading of the data is that where the assault was a singular event, the vast majority of victims continue to make their complaint to the police fairly quickly after the alleged assault.

Table 13 Length of Time Before Reporting Complaint by Time Period

(Percentage Distribution)

Length of Time	Time Period: Before	During	After	Total
Immediately	78	78	55	64
Within 24 Hours	10	11	8	9
24 to 48 Hours	4	7	6	6
48 hours or More	4	--	22	14
Not Applicable	4	4	9	7
Numbers	(51)	(27)	(118)	(196)

According to police records, in about two-thirds of cases, it is the victim who makes initial contact with the police. While most do so by telephone, victims in the years following the legislation are considerably more likely to report to police in person (Table 14). In one-quarter of cases, the first contact with the police is through a third party, typically a relative, friend or boyfriend (Table 15). However, in about 32 per cent of cases, the assistance came from strangers or acquaintances (i.e., landlords, people who the victim approached for help, doormen at one of the clubs in the two cities, etc.).

Table 14 Method of First Contact With Police

(Percentage Distribution)

Method	Before	During	After	Total
In Person	8	11	26	19
By Telephone	90	86	65	74
Other	2	4	9	6
Numbers	(51)	(27)	(118)	(196)

Table 15 Who Made First Contact by Time Period

(Percentage Distribution)

Individual	Before	During	After	Total
Victim	36	30	52	45
Friend	9	4	2	4
Boyfriend	2	-	1	1
Family Member	24	13	16	18
Other	29	52	28	32
Numbers	(45)	(23)	(109)	(177)

3.2.7 Victim Treatment

In this section, we examine what the data from police records indicates regarding the way in which victims were treated once they lodged a complaint. Table 16 shows the number of interviews victims experienced and Table 16 outlines and summarizes a number of aspects of what happened in these interviews. Overall, of the victims interviewed, some 62 per cent were interviewed more than one time and as Table 16 shows there is a slight tendency for victims to be subjected to more than one interview in the post legislation than in the prelegislation period. At the same time, the average

number of interviews works out at 2.16 and the small differences between the three time periods do not suggest that there has been much change in police practice.

Table 16 Number of Interviews With Police

(Percentage Distribution)

Number	Before	During	After	Total
One	42	33	38	39
Two	27	33	30	30
Three	23	11	20	20
Four or More	8	22	12	12
Averages	2.13	2.33	2.20	2.16
Numbers	(52)	(27)	(126)	(205)

In general, there does not seem, in those aspects we were able to record, much change in the way victims are treated and processed by the police. In more recent years, victims are slightly more likely to be seen by a female police officer, and for the same officer to conduct any further interviews with the victim. In the post legislation period, there appears to be somewhat less attention to medical evidence about injuries (or there were fewer injuries in need of reporting), an equally small change in reporting evidence of the past history of the victim and a very tiny drop in the minority of cases where the police believed the complainant to be lying and suggested a polygraph test.

In summary, the patterns of change suggest modest but hardly dramatic or remarkable changes in police practices over the three time periods. Clearly, in the absence of a larger data base, it is difficult to know whether observed changes are a result of changes in police practices or changes in the kinds of cases that have come to police attention.

Table 17 Aspects of Victim Treatment By Time Period and in Total

(Percentage Distribution)

Aspect	Time Period: Before	During	After	Total	n
Female Officer	31	38	36	35	(73)
Friend/relative	67	22	37	41	(35)
Same Officer	34	31	43	39	(81)
Evidence victim of Bad Character	30	21	20	23	(48)
Evidence Victim Lying	24	17	19	20	(42)
Polygraph Suggested	9	7	5	7	(14)
Medical Treatment	38	28	32	33	(67)
Injuries Noted by Physician	22	11	11	14	(27)
Sexual Assault Kit Used	34	17	23	25	(50)

3.2.8 Police Activity

Table 17 outlines data recorded in the files concerning subsequent activities of police with respect to complaints received. In Table 19, the outcomes of their investigations are presented. In about 70 per cent of cases, the complainant was able to identify a suspect and a suspect was apprehended in just over 49 per cent of cases. As Table 17 indicates, there has been a slight increase in the likelihood of a suspect being identified, but there is no reason to suppose this change is related to the implementation of Bill C-127. In general, data from police records do not suggest very much change in police procedures, activities and decisions over the three time periods.

Table 19 indicates police classifications of these complaints. The category "otherwise", though not used systematically by police in the two jurisdictions, generally refers to cases where the victim is unwilling to proceed any further with the complaint.

The "other" category includes cases where a suspect was identified but for various reasons, the file was closed. Thus, it is not always clear when the case was withdrawn by the victim or the file was simply closed, what perception the police had regarding the case. Thus, the most important statistic in Table 19 is the relatively small proportion of cases that the police were prepared to categorize as "unfounded". Ignoring the transitional year 1983, which was atypical in that it included both old and new legislation, and in any event, includes only 29 cases, in only eight and 10 per cent of reported cases did police appear not to have believed the victim's story and, therefore, closed the case. Other changes shown in Table 19 do not, in our view, add up to a consistent pattern of change.

Table 18 Police Activity Following Complaint

(Percentage Distribution)

	Time Period				
Activity	**Before**	**During**	**After**	**Total**	**n**
Witness Interviewed	75	52	53	58	(122)
Difficulties in Investigation Noted	73	68	58	63	(129)
Evidence Gathered	41	43	34	37	(77)
Suspect Identified by Victim	67	77	70	70	(138)
Suspect Apprehended	49	48	49	49	(103)
Suspect Admit Guilt	6	4	6	5	(11)
Charges Laid	41	29	39	38	(78)

Table 19 Police Classification

(Percentage Distribution)

Classification	Time Period: Before	During	After	Total
Founded	65	49	50	54
Unfounded	8	21	10	11
Otherwise	15	17	22	19
Other	12	13	18	17
Numbers	(52)	(29)	(130)	(211)

3.3 Analysis of Court and Crown Records

The first stage of the filtering process in any kind of criminal case is the police. In this respect, New Brunswick is atypical among provinces in that while police may recommend a charge, they lay an information with the crown attorney's office. The latter makes the decision whether to lay charges and what level of charge should the decision be to proceed with the case. In the following sections, we briefly examine what the court and crown records show about the minority of cases which proceed to prosecution.

In the two years prior to Bill C-127, there were 24 adult cases in which charges proceeded in the two jurisdictions. In the transitional year 1983, there were nine cases, and since Bill C-127 there have been another 39 cases for a total of 70 cases. Clearly, unless a suspect is apprehended, there can be no prosecution. Overall, approximately 34 per cent of reported cases go on to prosecution, more of those where there was an accused did so in the years prior to Bill C-127 than in the years after the legislation came into force (92 per cent as compared to 64 per cent and 62 per cent, respectively). The data has been broken down by three time periods. But for many variables, especially where many cases are in a "not applicable" category, the base becomes too small for percentage differences to be taken very seriously. Large differences have been noted but we have otherwise presented mainly the overall figures.

Over the evaluation period, there were five cases (eight per cent) in which the victim was male. These are distributed fairly evenly over the three time periods. Similarly, marital status of victims has not changed appreciably. Approximately 76 per cent of complainants were single at the time of the incident. Between 1981 and

1987, there were only four cases prosecuted where the victim was married (i.e., one in each of the two earlier periods and two in the post legislation period).

Data recorded by the crown counsel do not usually include the occupational status and educational level of complainants whose cases proceeded to prosecution. There is, for example, data on occupational status for about 50 per cent of cases and educational data on 25 per cent of cases. Some of this has been inferred from other sources within the files. No particular pattern is evident except that just over 50 per cent of victims (53 per cent) were students at the time of the assault. This is not surprising given that 47 per cent of victims were under age 20 and 75 per cent were 24 or younger at the time of the trial. The average age of victims whose case was prosecuted is 21.5. It appears, however, that there has been some change in age over the years of the study. For example, mean age in the period before the legislation was 19.1, in the transition year 1983, 22.5, and in the post legislation period, 23.2. To put this into percentages, in the before period, 58 per cent of victims were under 20, whereas in the years after the legislation this proportion had fallen to 36 per cent. Again, we would repeat that we are excluding from this analysis all cases where the victim was under 16 at the time of the alleged offence.

Approximately 92 per cent of prosecuted cases involved only one defendant and in five cases (eight per cent) two defendants were tried in the same prosecution. As the above analysis of police records has shown, all defendants over the three time periods were male.[3] The average age of the accused is 31.5 but the range is from 17 to 64 with no apparent modal age. Of the 39 defendants, for which there is information available all but four were employed in unskilled occupations or were unemployed. Some 36 per cent of defendants were single, 28 per cent were married and the rest were separated or divorced at the time of the alleged offence. It appears that just over 63 per cent had a previous criminal record, generally for offences such as break and enter and theft.

3.3.1 The Filtering Process

Police records indicated of the kinds of sexual assaults reported to the police and the relationship of the offender and victim. Given that some cases have greater certainty of conviction than others (where, for example, there is dispute about consent of the victim), it is of interest to see whether cases forwarded for prosecution differ in any respect from those reported to the police. As the following tables suggest, the distribution of case characteristics that were sent to crown counsel are very similar to the larger group initially reported to the police. The type of sexual contact is as varied

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[3] One particularly vicious case in Saint John involved two males and a female as defendants. As well as being forced to perform fellatio and being raped by both males, a broomstick was forced up the anus of the victim. The female who both hit the victim and held a knife to her throat to force her to perform fellatio on the males, was charged under s. 246.2 but was found guilty in a jury trial of common assault.

among cases that were prosecuted as those that were reported. The main difference is that a smaller proportion of prosecuted cases (20 per cent versus 32 per cent) involved actual sexual intercourse (Table 20). Similarly, the distribution of places of the offence is not markedly different in the two data sets (Table 21).

Table 20 Type of Sexual Contact for Reported Cases and Prosecuted Cases

(Percentage Distribution)

Type of Case	Police	Court
Genital Intercourse	32	20
Attempted Intercourse	3	5
Touching\Grabbing	28	28
Insertion of Finger	2	2
Other	20	9
More than One	16	36
Numbers	(186)	(56)

Table 21 Place of Offence

(Percentage Distribution)

Place	Police	Court
Victim's Home	24	18
Offender's Home	12	17
Other Residence	5	6
Vehicle	13	20
Public Street/place	23	22
Other	21	19
Numbers	(200)	(54)

As can be seen in Table 22, for a variety of other characteristics there are only trivial or unpatterned differences between reported cases and those which were accepted for and available for prosecution.

Table 22 Selected Case Characteristics for Reported Cases and Prosecuted Cases

(Percentage Distribution)

Characteristic	Police	n	Court	n
Physical Force	59	(94)	76	(42)
Verbal Threats	48	(47)	50	(25)
Victim Injuries	36	(54)	40	(20)
Appeasement of Victim	16	(10)	22	(10)
Resistance by Victim	90	(113)	83	(38)
Offender Drinking	71	(71)	72	(37)
Victim Drinking	56	(57)	39	(20)
Weapon Used	14	(22)	15	(8)

3.3.2 Trial Process

As described in Chapter 2.0, the court and crown files generally do not contain a record of what occurred in the preliminary hearing or trial. The following paragraphs address what is known about cases that went to prosecution and their outcome. Not surprisingly, given the considerable consultation between the two levels of the system, the vast majority of cases, 92 per cent, the crown counsel proceeded with the same charges as suggested by police. It also appears that crown counsel seldom withdraw a sexual assault case. Only two in the prelegislation period and three in the post legislation period were stayed or withdrawn by crown attorneys (10 per cent of all sexual assault cases).[4] Similarly, over the entire period only three cases (five per cent) were withdrawn by the complainant, a finding which accords with crown attorney's contentions that victims seldom withdraw their complaint at this stage of the process.

Some interviewed defence counsel interviewed are of the view that one impact of Bill C-127 is that it increases the likelihood of a guilty plea. Admittedly, most were thinking about child cases where a defence as "honest belief" in consent is irrelevant. With respect to adult cases, this perception is only partially borne out by the data. Overall, some 30 per cent of defendants pleaded guilty and over the three time periods there has been a slight upward trend in this respect. Proportions pleading guilty have moved upwards from 23 per cent in the prelegislation period to less than 35 per cent in the post legislation period.[5]

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[4] In general, it appears that 25 to 37 percent of criminal cases are terminated by crown counsel (see Griffiths et. al., 1980: 146).

[5] Again, while the statistics vary from jurisdiction to jurisdiction, it appears that from 46 to 65 percent of criminal cases result in a guilty plea (Griffiths et. al., 1980: 146).

As Table 23 indicates, there were, in about 47 per cent of cases, one or more pretrial motions and a preliminary hearing in some 53 per cent of cases. It appears that preliminary hearings were more common under the previous legislation than the present: 68 per cent compared to 46 per cent. Also, in the "before" years, there were eight voir dire hearings (40 per cent) compared to only one (four per cent) in the post legislation years.

Table 23 Numbers and Types of Pretrial Motions

Type of Motion	Per cent of Cases	Number
Ban on Publication of Evidence	21	10
Ban on Publication of Victim's name	2	1
Motion to Delay	6	3
More Than One Motion	27	13
Other	6	3
Not Applicable	37	18
TOTAL		(48)

In 69 per cent of cases the accused was committed to trial. Of these, 32 per cent were tried by a provincial court judge, 20 per cent by Court of Queen's Bench judge alone and 48 per cent by judge and jury. While the proportion of accused committed to trial remains much the same over the three time periods, Table 24 shows that there has been a change in the kind of trial. It is evident that far more sexual assault cases are presently being heard at the provincial level than prior to Bill C-127.

Table 24 Type of Trial by Time Period

(Percentage Distribution)

Type of Trial	Time Period			
	Before	During	After	Total
Provincial Court Judge	11	17	48	32
Court of Queen's Bench Judge	26	17	16	20
Judge and Jury	63	67	36	48
Numbers	(19)	(6)	(31)	(56)

For cases that did go to trial, the outcome is shown in Table 25. It is evident in a majority of cases, the defendant was found guilty. And to these cases must be added those who pled guilty before trial.

Table 25 Trial Outcome by Time Period

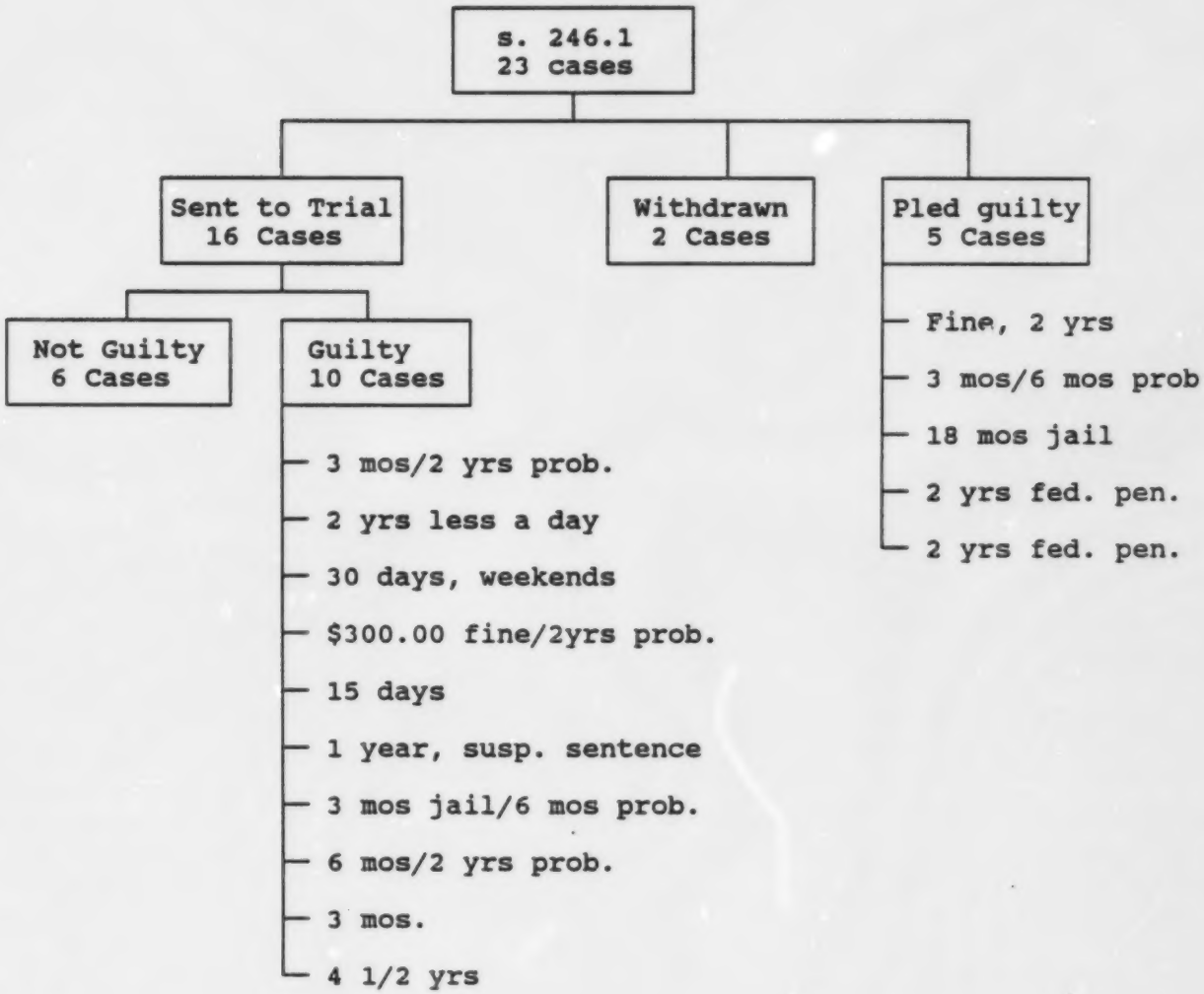
(Percentage Distribution)

Outcome	Time Period			
	Before	During	After	Total
Guilty	64	60	79	70
Not Guilty	14	20	17	18
Dismissed	7	--	--	2
Hung Jury	14	20	4	10
Numbers	(14)	(5)	(24)	(43)

Two-thirds of the defendants who pled guilty or were found guilty received a prison sentence. Another 23 per cent received more than one kind of sentence, generally a prison sentence and a fine. There has been a slight decline in the likelihood of a prison sentence from 72 per cent under the old legislation to 62 per cent under the present legislation. The ten per cent difference is entirely accounted for by the fact that in three cases, judges chose probation rather than a prison sentence, something that was

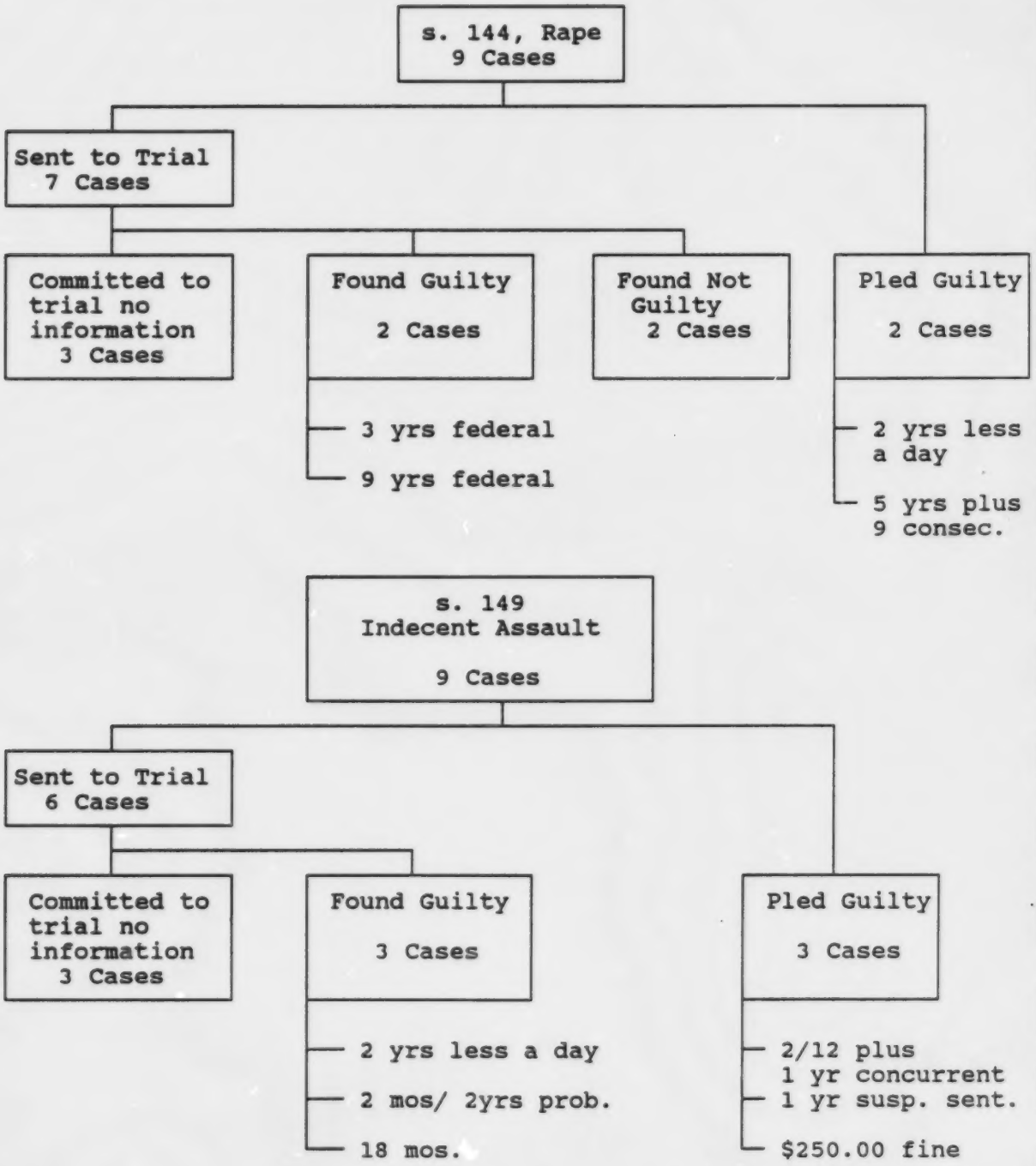
not done in the two earlier time periods. Figures 1 and 2 give some further details of sentencing outcomes, both before and after the new legislation came into force. Left out of these figures are the cases which did not go forward as sexual assault cases but common assault or break and enter and so forth.

Figure 1 **Sentencing 1983 to 1987**



s. 246.2 -- One withdrawn;
One pled guilty -- 10 years plus
10 consecutive other counts
s. 246.3 -- Trial -- nine years

Figure 2 **Sentencing, 1981 to 1982**



3.4 Rape Crisis Centre File Analysis

Rape crisis centres, or sexual assault centres as they are now called, emerged in the 1970s as part of the women's movement and its struggle against rape. These centres were organized to provide a support service and information to the individual rape victim. They also function as advocacy groups to bring about legal change and to educate the public.

Over the years, sexual assault centres have gained considerable credibility in the eyes of many women because they offer assistance and advice as well as anonymity and confidentiality. Their philosophy is victim directed. They are there to help the victim in ways she feels are important. No pressure, for example, is put on the victim to report to the police or get professional help. Many victims who go to sexual assault centres never approach the criminal justice system.

The Fredericton Rape Crisis Centre is the only centre in the province of New Brunswick; it has been in existence since 1975. It is staffed by volunteers and one full-time paid person who manages the office and serves as spokesperson for the centre. In theory its services are available to any victim in the province. However, in practice, most cases come from the Fredericton area.

For reasons of confidentiality, the Fredericton Rape Crisis Centre did not want to give outsiders access to its files. Therefore, recording of data from the centre's files was done "in-house" by two volunteers paid by us. Data were collected for the years 1981 to May, 1988. In total, we received information on 140 cases.

We knew at the design stage of this evaluation that the data available from the centre would be sketchy and somewhat incomplete from our point of view. For example, the data recorded on the "file crisis card" is quite variable, depending on the kind of case, who is actually taking the call or seeing the victim, and the decision of the volunteer as to what additional matters to record. In addition, the types of information available to the volunteer is constrained by the type and amount of information the victim is willing to provide. Upon examination of our data, we found that we did not have comprehensive information on the social characteristics of either the victim or offender, or detailed aspects of the assault.

Since a major goal of this evaluation was to compare the situation before and after the introduction of Bill C-127, we divided all our data from the Centre into three periods: "before" (1981 and to 1982); "during" (1983); "after" (1984 to 1988). Of the 140 cases, 23.6 per cent (n=33) fell in the "before" period; 15.7 per cent (n=22) in the "during" period; and 60.7 per cent (n=85) fell in the "after" period.

Information on the type of offence reported to the centre was available for most cases. Overall, 89 per cent of the cases were classified as rape or sexual assault and

another five per cent were designated as attempted rape. When we compare the "before" and "after" period, we find no significant difference. Eighty-seven per cent of the cases in the "before" period were classified as rape and 91 per cent in the "after" period were so classified (Table 26).

Table 26 Classification of Offence

(Rape Crisis Centre Files)
(Percentage Distribution)

Classification	Before	During	After	Total
Rape	87	82	91	89
Attempted Rape	3	9	5	5
Indecent Assault	6	9	-	3
Other	3	-	4	3
Numbers	(31)	(22)	(81)	(134)

One cautionary note should be raised with these data. We do not know how the designation "rape" or "sexual assault" was interpreted by the different volunteers who recorded this information on the "crisis file card". The centre does not keep track of the specific offences as would be designated by the Criminal Code.

Some indication, however, as to the specific types of offences which are likely to be reported to the centre was gathered through a question regarding the type of sexual contact that occurred. In 65 per cent of cases (n=81) there was genital intercourse. Comparing this in the before and after period, we find 57 per cent of cases (n=8) in the "before" period, and 70 per cent of cases (n=37) in the "after" period, involved genital intercourse. In the "before" period, an additional 36 per cent of cases (n=5) involved more than one type of sexual contact; in the "after" period, this figure was 19 per cent (n=10).

In neither the before or after period was a case reported which involved only touching and grabbing. It appears then that despite the change in legislation which removed the emphasis on penetration in sexual assault, the majority of women who go to the rape crisis centre are still those who are "raped".

Rape was considered to be one of the most underreported of crimes. The reform legislation was intended to remove some of the cultural stigma associated with sexual offences in hope that more victims would report the crime. While this was directed primarily at increasing reporting to the criminal justice system, one might assume that if the stigma was minimized, more women would be willing to report.

Our data suggest this may be happening, although not in any dramatic or systematic way. In the "before" period, approximately 16 victims per year contacted the centre. In 1983 this number increased to 22. In the "after" period, however, the number of centre reported incidents of sexual assault varied from year to year. In 1984, 22 cases were reported but in 1985 there were only eight cases. The number increased again in 1986 and 1987 (21 and 26 cases, respectively), but appears to have dropped for the current year with only six cases in the first five months.

We know that large numbers of women who go to the rape crisis centre do not report the sexual assault to the police. In fact, it is conceivable that the type of person who is likely to go the centre is also the type of person who, for a variety of reasons, would never report to the police. The centre's guarantee of anonymity and confidentiality is appealing to such women.

However, if the new legislation is having any impact on reporting rates in general, one might expect to see an increase in the number of cases being reported to the police after the implementation of Bill C-127 by individuals who use the services of the rape crisis centre. Our data suggest that there are no significant differences here in the before and after period (Table 27).

Table 27 Victims Reporting to the Police in Each Time Period

(Rape Crisis Centre Files)
(Percentage Distribution)

	Before	During	After	Total
Yes	35	23	36	34
No	65	76	60	64
N/A	-	-	3	2
Numbers	(20)	(17)	(66)	(103)

In summary, based on the number of victims that came to the centre, just over one-third reported their case to the police in both time periods.

However, there are some differences in terms of what happened after the case was reported. In the "before" period, the investigation was continued in 40 per cent of the cases (n=5), whereas in the "after" period, the investigation was continued in 75 per cent of the cases (n=20). In the "before" period, the victim also dropped the charges in 60 per cent of the cases (n=5), whereas in the "after" period, this occurred in only one case. Overall information regarding how the victim felt about her experience with the police is not available from our data.

A crucial question that has evolved from these findings is why do victims choose not to report to police. We have qualitative information on this question for 30 cases, 23 per cent of which fall in the "before" period and 60 per cent in the "after period". We did not break down this information into the two periods because of limited numbers. However, the statistical data show that more victims cited fear of offender and fear of the criminal justice system as reasons for not reporting in the "after" period.

In nine cases, the victim either did not want anyone else to know or simply wanted to forget the whole thing. In four cases, the victim either partially blamed herself for what happened, or felt that she would not be believed. In three instances, the victim expressed fear of the criminal justice system, and in another three the victim simply stated that she did not want the police involved with no reasons given. In nine cases, the victim did not report to the police because she feared retaliation from the offender or was afraid of other outside repercussions. And in two cases, the victim said that she wanted to handle it herself (Table 28).

Table 28 Reasons Victims Did Not Report To Police

(Percentage Distribution)

		Numbers
Did not want anyone to know/ wanted to forget	30	(9)
Self-blame/felt she would not be believed	13	(4)
Fear of the Criminal Justice System	10	(3)
Did not want police involved	10	(3)
Feared retaliation from offender/afraid of outside repercussions	30	(9)
Wanted to handle it by herself	6	(2)

Have the characteristics of the complainant or the offender changed since the new legislation? If we look at the marital status of the victim at the time of the attack, we find a larger percentage of the women were single in the "before" period - 83 per cent (n=24) compared to 67 per cent (n=67) in the "after" period. In both periods, however, the majority of victims were between the ages of 16 to 25 (69 per cent and 64 per cent, respectively).

A common misconception about sexual assault is that in the majority of genuine cases the assailant is unknown to the victim (Renner et al., 1988). However, our data, like other research, does not bear this out. In 52 of the 89 cases (58 per cent), the assault was committed by persons familiar to the victim. (In this category of familiar we included such relationships as friends, acquaintances, neighbours, co-workers, boyfriends, dates, spouses etc.). In addition, another 11 per cent involved new acquaintances. By contrast, only 29 per cent involved strangers (Table 29).

Table 29 Relationship of Offender to Victim

(Rape Crisis Centre Files)
(Percentage Distribution)

Relationship	Before	During	After	Total
Stranger	17	18	36	29
New Acquaintance	8	27	11	12
Familiar Person	74	55	53	53
Numbers	(23)	(11)	(55)	(89)

It appears that a larger number of cases involving strangers were reported in the "after" period, but we were unable to find any explanation for this from our data. Given the new legislation eliminated spousal immunity, it is interesting to note, however, that in the "after" period there were three cases reported in which the offender was a spouse and another where he was the common-law partner of the victim.

In 26 per cent of all cases (n=88) the assault took place in the victim's residence; in another 16 per cent of cases, the attack occurred in the offender's residence (Table 30).

Table 30 Place of Offence

(Rape Crisis Centre Files)
(Percentage Distribution)

Place	Before	During	After	Total
Victim's residence	14	44	25	26
Offenders residence	29	13	12	16
Common residence	5	6	12	9
Other residence	10	13	5	7
Vehicle	25	19	19	19
Public Area	5	6	18	13
Other	14	-	10	10
Numbers	(18)	(16)	(54)	(88)

We only have information on the circumstances surrounding the assault for 48 cases, however in 33 per cent of those cases, it was a surprise attack (Table 31). If this percentage is broken down by time period, it has risen dramatically in the after period. In the two earlier periods, a surprise attack occurred in 17 per cent of the cases while, in the after period, this number rose to 43 per cent. Another 25 per cent of the attacks occurred in conjunction with an offender break-in. This number did not change very much from the "before" period to the "after" period but in the "during" period, 67 per cent of the cases involved an offender break-in. The significance of this is negligible, as we are returning to approximately four out of six cases.

Only four per cent of the incidents occurred while the victim was hitchhiking. In one case during the after period, the offender had asked the victim for help; in the remainder of cases, the offence occurred on a date (15 per cent) or between people who met in some other social situation (21 per cent). This information is presented in Table 31.

Table 31 Circumstances of Attack

(Rape Crisis Centre Files)
(Percentage Distribution)

Circumstance	Before	During	After	Total
Surprise Attack	17	17	43	33
Offender Break in	17	67	20	25
Victim Hitchhiking	8	-	3	4
Offender asked victim for help	-	-	3	2
Date	42	-	7	15
Met in social situation	17	17	23	21
Numbers	(12)	(6)	(30)	(48)

The most striking difference in this table is the shift that has occurred between the "before" and "after" period. In the "before" period, the largest proportion of cases involved a "date rape" while in the "after" period, the largest proportion of the cases reported to the rape crisis centre were surprise attacks. The reason for this shift is not obvious, but it is unlikely that it has to do with the new legislation. A possible explanation is that there has been an increase in the number of surprise attacks occurring in the last five years. This explanation is consistent with the data discussed earlier showing an increase in the number of cases reported involving strangers.

According to the data available in this analysis, an overwhelming proportion of cases involve only one offender. This has remained consistent over time (approximately 90 per cent). Also, in almost all cases, the offender was a male. Only two cases (reported in the after period) involved female offenders. A weapon was involved in eight per cent of cases (n=13) in the before period and 16 per cent in after period (n=32) This weapon was most likely to be a knife. Only one case was reported (in the during period) where the weapon was a gun.

Physical force was used in 85 per cent of cases (n=13) in the "before" period and in 82 per cent of cases (n=27) in the "after" period. In 56 per cent of cases (n=9) the victim sustained injuries in the "before" period and in 65 per cent of cases (n=26) in the "after" period. However, on both of these variables, the number of cases with this information was very limited. Most victims had, when they reported to the centre, either sought medical attention (59 per cent, n=53) or planned to (nine per cent). Only two victims reported that a sexual assault kit had been used. However, in 108 cases, we do not know what type of medical procedure was used.

The purpose of this analysis was to determine if any changes have occurred since the introduction of the new legislation. From the available data, it seems that there

have been very few changes. There seems to be a slight increase in the number of cases being reported to the rape crisis centre but we have no way of determining the reason for this. It may be that more victims are now aware of the existence of the centre or perhaps, because of changing public attitudes toward sexual assault, victims are more likely to come forward. Another possible explanation may be that more assaults are occurring; however it is impossible to assess the proportion of sexual assault victims that do not come forward.

One change that may be attributed to the new legislation is the liklihood of investigations being continued, after the victim has reported to police. Victims are also less likely to drop charges. This may be related to the new rules of evidence or perhaps, the changing views of sexual assault. It is most likely both.

The nature of the assaults being reported to the rape crisis centre seems to have changed somewhat. A smaller proportion of single women have been reporting and the assaults tend to be more likely to be surprise attacks involving strangers. There is also more likely to be a weapon involved and there seems to be more injury to the victim. In the "before" period, it seems that mainly single women were being attacked by someone they knew, probably on a date. We would expect that with the broader definition of sexual assault found in Bill C-127, we would find a smaller proportion of so called "classic" rape cases being reported. However, the opposite seems to be true. A frightening possibility is that there has been, an increase in the number of incidents in the past five years where a stranger comes out of the bushes (or alley, etc.) and attacks an unsuspecting victim perhaps with a weapon.

3.5 Conclusions

The Criminal Justice File Analysis does not allow us to draw very firm conclusions about the extent of sexual assault either in these two jurisdictions or with regards to changes that have occurred in result of the new legislation. It is fairly apparent that the circumstances surrounding cases reported to police and to the rape crisis centre have not changed in the years reviewed of this study.

Each year there is a constant number of cases reported in which the victim was attacked or molested on the street by an unknown offender. Each year, few women report they were assaulted in connection with a break and entry. And each year, there are few cases where there is a rape or attempted rate by someone the victim did not know very well or had just met. As well, there have been a few extremely brutal cases that can be described as a "gang rape". If there is a change, it is the likelihood that the victim will know the offender as an acquaintance or a present or past friend.

As noted below, and discussed earlier, most criminal justice attention has shifted to cases involving victims under age 16. These are, quite clearly, showing up more frequently in the courts either because they are being reported more often or are

occurring more often than in the past. But, with respect to adult cases, there is no evidence to suggest that the kinds of cases or the level of reporting has changed over the years before and after Bill C-127 has come into force.

The pattern of offender characteristics has also not changed much over the evaluation period. Some, who are apprehended, are acknowledged by everyone to be "sick" but seem to limit their behaviour to touching and grabbing or exhibitionism or lewd and obscene remarks. Others have been sexually assaulting victims who are members of their own families, often over a long period of time. These offenders are also generally perceived to be in need of treatment. Perhaps the most constant type of offender is the one whose act is but one in a constellation of substance-abuse-related crimes which make up his criminal history. Often these crimes are in the realm of what Leyton (1979) calls senseless acts. They are senseless in that, once drunk or stoned, these men act impulsively and without regard to the consequences for themselves or their victims. Whether such men steal or commit violent acts--including rape--as a result of substance abuse, or whether they abuse substances to gain courage to perform these acts is unclear. What is clear is that, under some circumstances, these men can be dangerous.

As we describe in the next section of this report, there is a general perception by those working in the criminal justice system that victims are, by and large, treated better than they were in past years. The objective evidence from the three sets of files does not allow us to make an independent assessment of these perceptions. Our sense is that those who reported a sexual assault in the prelegislation and post legislation periods were taken seriously by the police. In the absence of transcripts for the various trials we cannot comment on whether complainants were more likely to be harassed by defence lawyers under the previous legislation than under the present. Nor is there evidence to suggest that it is easier or harder to obtain a conviction under the new legislation. And, finally, sentences for those pleading or found guilty do not appear to have changed in systematic ways.

A familiar metaphor to describe the transformation of criminal cohorts as they move through the criminal justice system is the "crime funnel". As described by Brannigan (1984: 94), the volume of crime varies at the point it is measured because:

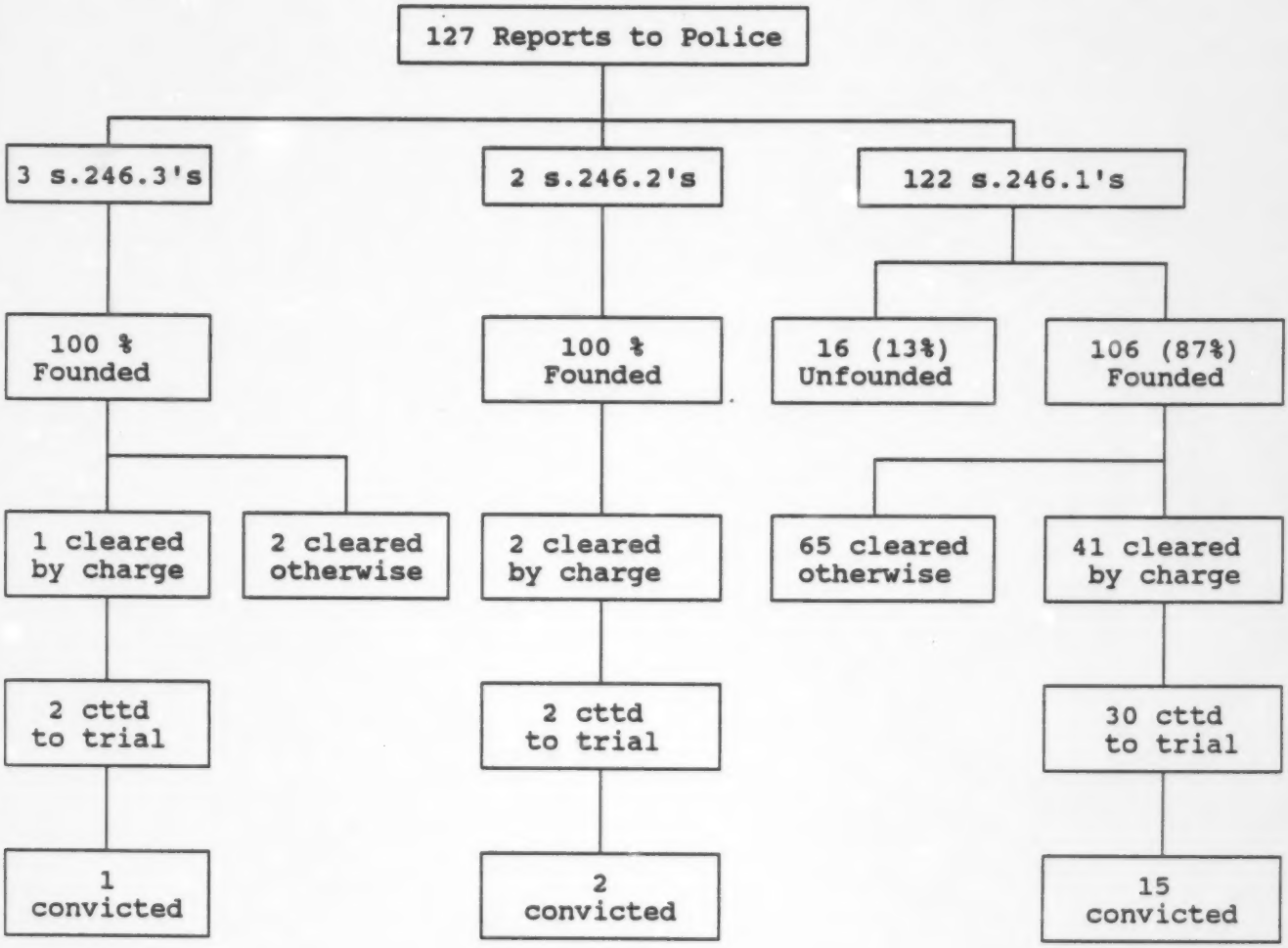
> Only a portion of all crimes will be noticed by the public or the victim. Of these, only a portion will be reported to the police. Of these, only a portion will result in an arrest. Of these only a portion will be prosecuted. And, of these, only a portion will be convicted.

The preceding analysis of the criminal justice system suggests that the crime of sexual assault leads to a process similar to what occurs for other kinds of crimes. While, by its very nature, sexual assault will not go unnoticed by the victim, he or she may not be aware that what has occurred is a crime. As the Canadian Urban Victimization Study found, even when there is an awareness that an assault has taken place, some

62 per cent were not reported to the police. One can only wonder what proportion of women are subjected to minor forms of sexual assault -- unwanted touching, grabbing, fondling and anonymous forms of obscenity and exhibitionism -- are not even aware that what has happened to them is a criminal offence.

Of those reported, the present research indicates that approximately 11 per cent were viewed as unfounded by police in the two jurisdictions. Overall, a suspect was apprehended in 49 per cent of reported cases. And, in total, 34 per cent of the originally reported cases went forward to prosecution, a ratio which has fallen from 45 per cent to 35 per cent over the three time periods. The most evident difference in the filtering process is that under the old legislation, approximately 92 per cent of cases where a suspect was apprehended went to prosecution compared to 64 per cent and 62 per cent for the transitional year and the post legislation period. Figure 3 shows the flow of cases and the filtering process since Bill C-127 came into effect.

Figure 3 **Flow of Sexual Assault Cases (1983 to 1987)**



One of the reasons for wanting data from the rape crisis centre files was to determine whether there is a large proportion of sexual assaults which do not come to the attention of the police. The scanty information recorded by the centre does not always indicate whether assaults reported to the volunteers also came to the attention of the police. Given the time lag between the date of the incident and the first contact with the centre, one could hypothesize that the centre is dealing mainly with victims who did not report but who are now going through some sort of emotional upheaval as a result of the sexual assault. But, the rape crisis centre files are silent on this matter. The volunteer may have asked whether the incident was reported to the police but the answer was not recorded.

In any event, even if it is assumed that most cases reported to the rape crisis centre were not turned into complaints to police, we are not dealing with a very large number of sexual assaults. No doubt, many more occur but victims choose not to report them. But, the simple fact is that the data from this evaluation do not allow us to conclude whether the problem is more or less widespread than is often alleged. The general conclusion we must draw, at this point, is that there has been little change in the number of cases, the kinds of cases, and the way in which they are treated within the criminal justice system.

4.0 INTERVIEWS WITH INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM, RAPE CRISIS CENTRE AND RELATED AGENCIES

4.1 Introduction

In this part of the report, we summarize what has been learned about the perceptions of the various actors in the criminal justice system and related agencies that deal with the offence of sexual assault. Our adversarial system is based on the assumption that these actors are required to play quite different roles, whatever their personal assumptions about the case. Police receive complaints and, through various means, attempt to find and to charge an alleged offender. Recently, concern about the trauma faced by victims of various crimes, including sexual assault, has led to a new role by a victim witness worker. The job of the crown attorney is to obtain a verdict of guilty and the kind of sentence which will "send a message to the community."

Under our adversarial system, the role of the defence lawyer is just the opposite. She or he has an obligation to attempt to undermine the evidence of the police and to question the legality of how the evidence was collected. Where there is little or no doubt about the guilt of the accused, or where he or she has pleaded guilty to the offence, there is the obligation to find something "nice" to say about the offender that might reduce the period of incarceration. Neither set of obligations are very easy things to do when one's client has been charged and is probably guilty of a vicious and/or morally repugnant sexual assault. Indeed, it is easy to understand why many lawyers do not want to deal with criminal cases.

The judge's role in criminal cases is also difficult. While he or she may be fully convinced the defendant is "guilty as hell", there remains the obligation to ensure the trial is fair to the defendant, that his or her rights are not undermined and that the jury (where there is one) is properly instructed regarding what weight and emphasis should be given to evidence presented by the prosecution and the defence. And at the end of the process is the difficult matter of sentencing.

The fact that defence lawyers and crown attorneys, during their careers, sometimes exchange roles, and that judges were once lawyers and sometimes crown attorneys, suggests at an abstract level, all share a similar definition of situation about the importance of the adversarial system and what it is they hope to accomplish together. However, at the everyday level, perceptions of the impact of Bill C-127 are not all of a piece. Whatever their personal biases and attitudes about sexual assault, most of the interviewed victims responded in terms of their official role in the criminal justice system. Before describing what each group of informants told us about sexual assault in

New Brunswick and their assessment of the impact of Bill C-127, it may be useful to outline briefly the New Brunswick situation and the nature of the system and the related agencies.

4.2 Agency Profiles

As we have seen, in Fredericton and Saint John, an average of 30 adult sexual assault cases are reported to police annually. As we have also described during the period 1981 to 1987, nine to 12 adult cases per year went on to prosecution. We asked about sexual assault, how it is dealt with now and how it was dealt with before Bill C-127. Our informants obligingly focused on this aspect of what, for all, is a relatively small part of their overall caseload. With the exception of the Fredericton Rape Crisis Centre volunteers, none of those interviewed deal exclusively or even mainly with adult sexual assault cases.

4.2.1 Police Officers

As near as we were able to establish, there is no formal division of labour in terms of which officer is likely to take on a sexual assault case. In Fredericton, cases involving children are inevitably, referred to the Youth Division. However, adult cases are dealt with by an available officer on shift at the time of the report. This is also true of Saint John, although there is informal agreement that one of the officers (a male) is particularly effective in dealing with sexual assault and, if on duty, will probably handle the case.

4.2.2 Victim Witness Workers

In Fredericton and Saint John, there is a victim witness program in place. The main difference between them is that in Fredericton, the worker is employed by the city police whereas in Saint John, the worker is attached to the probation service. While their mandate is to assist all victims of crime who must testify, it is apparent that much of their time is taken up with adult and child cases falling under s. 246. These are cases where there is likely to be the greatest trauma and, at the same time, the possibility that their testimony will be called into question by the defence lawyer and the victim's role in precipitating the incident discussed.

The victim witness workers receive referrals from the police, the crown attorneys office and, at times, lawyers in private practice. It was beyond our mandate to explore the many details of this service. We did learn, however, its primary benefit to the system is that it takes some onus off the crown attorney to spend extended time with the victim

of a sexual assault. While such interviews are still necessary, it has taken some pressure off of the crown attorneys who already feel overburdened.

4.2.3 Crown Attorneys

Given that there are only four and five crown attorneys in each of the two jurisdictions, these lawyers are unable to become specialists in the kinds of cases they bring to prosecution. For the most part, cases are assigned on a rotational basis. At the same time, it should be noted that, in Fredericton, many of the sexual assault cases were, until recently, prosecuted by one individual who has recently been promoted out of the crown attorney's office. But, as he, himself admits, this was more by accident than design and was in no sense a formal division of labour.

4.2.4 Rape Crisis Center Volunteers

The Rape Crisis Centre has been in operation for about 13 years. It receives most of its funding from the United Way. At any given time, there are an average of 10 volunteers associated with the centre, all of whom deal with victims of sexual assault. In general, the volunteers are young. The average age would be early 20s. Often they are university students and most do not remain with the centre for more than two years. Since Bill C-127 came into force, there has been discussion, from time to time, about changing the name to "The Fredericton Sexual Assault Centre." But, so far, this change has been resisted on the grounds that a name change would be confusing to those in the community who may need the services of this agency. As described below, it is the philosophy of the centre neither to encourage nor discourage victims from reporting to the police. And, as we have outlined earlier, the centre does not maintain consistent follow up data on whether those they deal with do report the case or whether it proceeds to prosecution.

4.2.5 Physicians

Physicians who maintain a general practice are, if they wish to have admitting privileges, expected to work a certain amount of time in the emergency section of the local hospital. In practice, there are some doctors who put in a considerable amount of time in emergency work and others who do so rarely, if at all. Some young doctors spend considerable time in emergency because it adds to their income and gives them experience of a range of illnesses, injuries and maladies than they are likely to encounter in their normal practice. And there are a few doctors in the community who do not have a normal family practice and who earn a considerable portion of their income from

emergency work. The result is that established general practitioners may not be called upon very often for this extra duty.

In short, while there are in Fredericton, three physicians specially-trained to deal with child sexual abuse there are no doctors in Fredericton or Saint John who would claim special expertise in the area of adult sexual assault, although some, because of their experience in emergency, will have seen a number of adult victims over the course of the years.

As described in Section 2.0 (Table 1) in all, we interviewed eight defence lawyers, nine crown attorneys, nine judges, thirteen police, two police victim witness workers, five volunteer workers from the rape crisis centre and two physicians.

4.3 Defence Lawyers

It is a policy of the Canadian Bar Association that while lawyers may indicate an interest in one or more areas of law, they are not permitted to claim to be specialists in, for example, family or criminal law. Thus, all lawyers who practise in New Brunswick are deemed to be competent to handle all kinds of cases. In practice, of course, many lawyers do confine themselves to one type of practice. This is especially so for lawyers engaged in civil litigation who do not ordinarily accept criminal cases and only rarely, as a favour to a client, a divorce case. However, the size of most communities in New Brunswick means that there are very few lawyers able to do the opposite and restrict their practice solely to criminal or family law. In other words, while there are many lawyers who do only civil litigation, there are only a few who confine their practice solely to criminal or family law.

We have interviewed the exceptions, those whose practice is mainly or exclusively in the area of criminal law. As it turns out, even these lawyers admit to having limited first-hand experience with the sexual assault legislation. With one exception, they were able to recall defending no more than two or three cases over the past year or two, usually child cases. Moreover, it appears that the small number of sexual assault cases which are prosecuted annually tend to be spread rather thinly among the various lawyers in Fredericton and Saint John who are enroled on the criminal legal aid panels and who are willing to take a criminal case. And, as some pointed out, since only a portion of cases -- adult and child -- actually go to trial, they have more experience of sentencing than a trial. In short, much of what these lawyers could tell us was, as they freely admitted, theoretical or based on their recall of an unusual case or set of circumstances.

Nevertheless, there was a high degree of similarity in their perceptions and assessments of the sexual assault legislation. None like it and for very similar reasons. The procedural changes, particularly limitation of introduction of evidence about the

victim's previous moral reputation, are generally seen as undermining due process and as making the job of defending the client extremely difficult. As was pointed out, recent complaint and rules of corroboration were excellent tools on which defence could base a case. These tools have been taken away and have left only the issue of consent, which is not relevant in child cases. As one lawyer put it, there is no point in going to a jury trial in child cases because, under the present system it is virtually impossible to establish the innocence of a defendant.[1]

One of the leading criminal lawyers in the province generally agrees with the shift in emphasis away from rape to the assault-related aspects of the offence and believes that judges can determine the seriousness of the assault and will sentence accordingly. This was a view shared by another lawyer who believes that the three levels of sexual assault are unnecessary, since a judge will take into account circumstances in sentencing and won't use the maximum anyway. However, the main concern of this first lawyer is that since an individual can be prosecuted on the basis of noncorroborated evidence, there is a need to protect the identity of the accused until he or she is convicted. This is because those accused of a sexual assault, especially against a child, are "ruined" in their community even if found not guilty.

There is general agreement that the main change in type of cases is that there are far more cases involving children as victims than in the past. None attribute this to Bill C-127, but to the generally heightened awareness of this problem. Based on their own limited experience and what they hear generally, all believe that there has been little or no change in the number of cases where the complainant is a male or the complainant and accused are married to one another. Nor did any of these lawyers know of cases where the complainant was a prostitute. At a more subtle level, a few lawyers did, in one way or another, observe that the crown (at least in Saint John) seems to be proceeding with more minor sexual assault cases, such as fondling incidents and to be doing so mainly by summary rather than indictable conviction. One of these lawyers also noted that the kinds of cases being prosecuted are, in his view, becoming weaker and weaker.

Given that plea bargaining is officially prohibited in New Brunswick, it is difficult to ask whether the sexual assault legislation has made it easier or harder to bargain or negotiate. Nevertheless, in answer to the question, most indicated that in their view, there is now less flexibility than under the previous legislation. One reason given was

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[1] As noted earlier, it was difficult for most of these lawyers to focus their attention on the adult cases which are the subject of this particular report. As several mentioned, they simply don't see as many cases where the sexual assault victim is over 16 as in the past. One defence lawyer speculated that this may be because "virtue was prized more in the past."

that the more serious offence of rape might be dropped in favour of a guilty plea to the lesser offence of indecent assault. In general, however, there is agreement that the crown will not normally bargain on sexual assault cases. The exception, noted by two lawyers, is where it is felt that a trial will be too great an emotional strain on the complainant. In this situation, the crown might, in return for a guilty plea, not push for a heavier sentence or proceed by way of summary conviction.[2]

The main change in court-room tactics noted by these lawyers is that, for relevant cases, they must now devote more energy and time to finding ways to justify the introduction of evidence about the past conduct and/or recent behaviour of the complainant. But, as three or four pointed out in discussing this matter, harassment and humiliation of complainants in cross-examination has been grossly exaggerated. Of the four lawyers who have had experience of attempting to introduce evidence of past sexual conduct, three have been successful in convincing the judge that it was appropriate and necessary to do so.

There is general agreement that patterns of sentencing have changed to the extent that any convicted sexual assault offender can reasonably expect some prison sentence, even when it is a first offence.[3] Moreover, whereas in the past first offences in child abuse cases would usually have resulted in a suspended sentence, under the present legislation, "everyone" goes to jail if only for three months. On the whole, sentencing for more serious assaults is not perceived as having changed much since Bill C-127 came into force. Surprisingly, all felt that, on the whole, sentences meted out to offenders were generally appropriate, given the fact situation surrounding the case. Two lawyers, however, gave examples of cases (not ones they had defended) where, in their view, the sentence was insufficient given the seriousness of the offence (one defendant had received nine years and the other four years).

Despite their general concerns about the difficulties in defending sexual assault cases, most believe that the general impact of abrogation of the rule of "recent complaint" and the need for corroborative evidence is to damage the crown's case. All feel that evidence of an ongoing relationship between the complainant and the accused, that the complainant and/or the defendant were using alcohol or drugs at the time of the incident and, in the absence of physical injury to the victim, an accused's belief that there was consent are all factors weakening the crown's case.

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[2] Underlying questions about negotiation or plea bargaining is that there is room for the crown to reduce charges from s. 246.2 or s. 246.3 downward to s. 246.1. In practice, virtually all cases have proceeded initially under the first level of sexual assault.

[3] As with other data from our informants, we are reporting the perceptions of these actors in the system. As the preceding analysis indicates, this is an incorrect perception.

All informants were asked to indicate their agreement or disagreement with a series of statements about Bill C-127.[4] Lawyers, like academics, never agree fully about anything but there was general agreement that:

a) the new law violates defendants' rights to a fair trial;

b) the amendments were unnecessary;

c) protection has been afforded to women who were previously considered "unrapeable";

d) the amendment has been unsuccessful in shifting the focus from the sexual to the assault-related aspect of the offence.

Similarly, no-one agreed that the spirit of the amendments is being ignored or circumvented. However, opinion was divided as to whether the creation of three separate levels of sexual assault has provided sufficient flexibility for negotiation of cases with the crown and that Bill C-127 has simply brought the law in line with public and official consensus about sexual assault.

Finally, and not unexpectedly, there is general agreement among these lawyers that the procedural changes were a regressive step and that the rule concerning "recent complaint", the need for corroboration and fewer restrictions on cross-examination of complainant's past conduct and recent behaviour should be reintroduced. Nor, for rather different reasons, are most happy that "rape" has disappeared from the Criminal Code. Some felt that the concept of rape, as opposed to sexual assault has not disappeared from the public consciousness and that a charge of rape, because it is viewed as more heinous and unambiguous, has a greater deterrent value. We turn, now to consider the experience and opinions of their opposites, the crown attorneys in the two jurisdictions.

4.4 Crown Attorneys

Understandably, crown attorneys' assessments and perceptions are based on considerably more experience of sexual assault cases under both the previous and present legislation than are those of most defence lawyers. For example, their range of

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[4] The initial research instruments which we were asked to replicate used a Likert Scale in which respondents were asked to indicate their level of agreement or disagreement on a scale of one to seven. Given the small number of informants in each of the categories, this level of quantification seemed inappropriate and was not used in any of the interviews.

experience is from 10 to 17 years and while none could say precisely how many sexual assault cases they prosecute annually, the fact that cases are distributed on the basis of the availability of the various crown attorneys in each city means that all will have had their share of this type of case.[5] However, as with other informants in the criminal justice system, most remarked on the paucity of adult (as one put it, "classic") cases coming before the courts. And it was apparent that questions were often being answered in terms of child abuse cases they had prosecuted recently.

In the following paragraphs details of the answers to the various questions put to this group are outlined. But at the outset, it can be noted that, on the whole, crown attorneys are satisfied with the legislation, believe in the objectives it was designed to achieve and, for the most part, think these objectives are being met through both the formal provisions and a changing set of attitudes about sexual assault and treatment of victims. For example, there is consensus that victims have a far easier and less traumatic experience than was often the case under the old legislation. As one crown attorney concluded, "the legislation has intimidated everyone, but particularly defence lawyers."

The main area of complaint about the legislation is, interestingly enough, one mentioned by Greenspan and Jonas (1987): the abrogation of the rule of "recent complaint" is, in most circumstances, more injurious to the crown than it is to the defence. The consensus is that it was a mistake to do away with this rule because it strengthens the crown attorney's case when it can be used. And, as more than one commented, these kinds of cases, whatever they are called, are always hard cases, ones which quickly lead to "burnout." Whether it is called rape or sexual assault, the basic issues surrounding the offence do not go away because of a change in the legislation.

Turning to the more specific issues raised in the interviews, there seems to be consensus that the new legislation has not shifted the focus from the sexual to the assaultive aspects of the offence. One crown attorney noted that:

> The intent was to de-emphasize the sexual aspects but it hasn't done so. At the same time, one thing it <u>may</u> have done is to remove some of the stigma. Sexual assault is vague, rape is specific. But, I'm not sure any of this has got across to the public or to victims.

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[5] For a period, one of the crown attorneys in Fredericton appears to have handled most of the sexual assault cases. And, in both Fredericton and Saint John, the bulk of child cases will be prosecuted by the crown attorneys who generally deal with matters in the Unified Family Courts.

Another observed that "the shift is still ongoing, moving slowly, and it will take a generation or more to change common usage and terminology."

For all, the most significant difference in prosecuting cases under the present legislation has been the changes in evidentiary requirements and the positive impact that these changes have had on the experience of the victim. Crown attorneys are divided as to whether it is now easier or more difficult to prosecute a sexual assault case. From a positive standpoint, there is a general belief that there are fewer things to worry about and that it is now possible to give victims assurance that they will not be attacked on the grounds of their past history. As one interviewee commented, "It is now possible to prepare the victim better and to bring her to court with less negative attitudes about what is in store for her. Under the previous legislation it was 'open season' on victims: six or seven males could be brought to court to testify against the victim."

As just mentioned, the negative side is that abrogation of the rule of "recent complaint' has, for the most part, weakened the crown's position. While seldom a problem in child cases, where no one is surprised if victims do not complain immediately, it is a problem in adult cases.

Six of the nine crown attorneys interviewed believe that the crown's chance of obtaining a conviction has improved since Bill C-127 came into force and this is largely because of changes in evidence requirements. One pointed out that rules of evidence now protect the victim and have removed much of the stigma attached to the offence. Another noted that under old legislation, it was necessary "to grade" the offence and if the wrong charge was laid, it was possible to lose on a technicality. Now it is less important to scrutinize the charge in the first instance.

However, three crown attorneys are of the opinion that it is now more difficult to obtain a conviction in adult cases. For two crown attorneys, the issue raised is what we described earlier: crown can no longer use its strongest evidence, "recent complaint." For the other crown attorney, the difficulty goes far beyond Bill C-127. The Charter of Rights has vastly increased the rights of the accused and is "an unbelievable curse" (for attorneys).

With the exception of child cases, none of the crown attorneys are of the view that there has been a noticeable change in the kinds of sexual assault cases that they must prosecute. Most attribute the increase in "child abuse" cases to a change in public awareness and the child welfare legislation rather than to changes in the Criminal Code with respect to sexual offences.

Undoubtedly, one of the most contentious issues with respect to the prosecution of sexual assault offences centres is the use of the polygraph test, particularly for complainants. As evident in Section 3.0, in these two jurisdictions, the polygraph test is

used in less than one per cent of cases. This is borne out by what crown attorneys told us. Thus, it was apparent, for the most part, that questions related to the use of the procedure were answered in theoretical rather than empirical terms.

When discussing the polygraph test, most referred to it as a tool in which they had varying degrees of belief. It appears that they would only request a polygraph test of the victim, if the defendant had "passed" the test. Another recalled a case where both parties proved positive on the test with the result that the whole matter came down to a consent argument. Another noted that sometimes polygraph tests are justified where there is a serious problem with the nature of the evidence. Most noted that if a test was requested and the victim "failed" and the "accused" passed, they would probably withdraw the case or not lay charges in the first place. Also, most felt that results of a polygraph test would not seriously affect the prosecution because it is used primarily for confirmation or to clarify certain points in the victim's testimony. About half of those interviewed felt that the polygraph test was being used more frequently and half thought there had been no change since Bill C-127. The main reasons cited for the change were not legislative but unrelated factors such as greater confidence (in Saint John) in the polygraphist. Finally, crown attorneys were divided in their opinion as to whether this test is used more or less frequently in sexual assault cases than in other cases.

An important principle in criminal justice is the concept of an open court. Ordinarily, judges are reluctant to interfere with this principle. The exception seems to be trials involving younger victims. Under these circumstances, most crown attorneys indicated that they would request a cleared court and most felt their request would be granted. Other circumstances mentioned were where the offence was "a particularly gruesome assault involving a perverted, demeaning or degrading act or where the victim is chronologically older or mentally younger." But, in the majority of cases, crown attorneys are reluctant to make this request in part because they cannot promise the complainant it will be allowed and because most are committed to the concept of an open court and believe it adds credibility to testimony.

One of the more experienced crown attorneys noted that he is also generally opposed to a ban on publications because, in his view, the community must know about "its places of disease and decay." He will ask for a closed court and a ban on publication if the victim requests it but he believes that as a result of the Charter of Rights, it is less likely to occur.[6]

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[6] At the outset of what became a highly publicized case, this attorney wanted a ban on publication. The victim did not because she preferred truth to rumours. The judge, at the preliminary hearing was so surprised that there would not be such a request, that this prosecutor overrode the victim's wishes and made the request.

Crown attorneys are agreed that there is a need to spend more time with sexual assault victims than other kinds of victims and witnesses. While two felt that their workload did not allow them to spend as much time with victims as they would like, it does appear that ordinarily and, depending on the complexity of the case, that crown attorneys spend from four to twelve hours spread over four to six sessions working with and interviewing the client. The objective is two-fold: to establish rapport with the victim and to prepare her or him for what to expect in court. One also noted that it is extremely important to prepare the victim emotionally for the possibility of a not guilty verdict.[7]

With the exception of more use of victim witness programs and a possibly more sensitive approach to victims, these crown attorneys did not believe that there had been formal or informal changes in policies or procedures related to sexual assault.

As with defence lawyers, crown attorneys were quick to point out that "there is no plea bargaining in New Brunswick." In practice and despite the official policy, most felt it was sometimes necessary to bargain. This was especially so where the victim is too young or too emotionally upset to go through a trial. One noted that if he had a weak case under s. 246.2 or s. 246.3, he might reduce the charge to s. 246.1. But so few cases have been charged under these higher levels that the issue simply does not occur. Another mentioned that he has, on occasion, dropped a break and enter charge and "ran" with the sexual assault offence (which carries a lower maximum). And, in general, there is agreement that, in theory, the ability to proceed by way of summary or indictable convictions has introduced more flexibility. But to repeat, there appears to be little plea bargaining in sexual assault cases.

All crown attorneys were asked to assess the importance of various factors in persuading a judge or jury to convict. Despite changes in the law, there was general agreement that while it is possible to get a conviction in many circumstances and to lose under others, it is always useful to have corroborative evidence, an unblemished past history on the part of the victim, a defendant with a criminal record, evidence of injury to the victim and evidence that physical force was used and a weapon was involved. And, while it is difficult to introduce, recent complaint by the victim was judged by all to be extremely important. Factors viewed as generally unimportant are: penetration, relationship between offender and victim and their relative ages. However, as one crown attorney noted:

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[7] In different ways, the crown attorneys noted that victims are often required to tell their story too many times with the result that their testimony sounds to a jury too pat and rehearsed and as lacking authenticity.

> What it comes down to in less obvious cases is consent; this is where you win or lose. Corroboration helps, as of course, does evidence of bodily harm. Penetration doesn't matter much because of the consent issue. What I hope for is that the victim will come across well as a witness.

Given these perceptions, it is not surprising that none of the crown attorneys thought these factors had become less relevant under the new legislation. While, as was pointed out, they remain relevant but not material as they were under the old legislation, there was consensus that we are still dealing with the same offence and that the average jury looks at evidence in much the same way as under the old legislation.

As a result, only two felt that this had changed their courtroom strategies or tactics since Bill C-127 came into force. For one, the main change is greater use of summary convictions. For the other, the main change is that because he does not have to worry about corroboration and recent complaint, he has fewer problems in preparation and things have become simplified. Turning it around, we asked whether, in their experience, there had been a change in defence lawyers' strategies or tactics. Three felt that there was no change that they could think of. For the majority, the major change they had observed is that defence lawyers are much less likely to attack the character of the victim. However, as several noted, this is not a change; it was happening already. And two noted that there seems to be a tendency for lawyers to use consent or a mistaken belief argument more frequently and, in the process, to put the accused on the stand.

One objective of Bill C-127 was to make the legal process and the trial less harrowing and traumatic for the victim. In this way it was hoped that more victims would come forward and, once having done so, would pursue the complaint through to its prosecution. As noted at the outset of this section, most crown attorneys believe that things have improved for the victim. But, because in their experience, clients rarely withdraw their complaint, now nor did so in the past, it was not possible for them to assess whether there has been a change one way or another with respect to the likelihood of withdrawal of a case (either by crown counsel or the victim). Unlike other criminal cases, where a reluctant witness or victim will be summoned or charged with public mischief, this almost never occurs with sexual assault victims who wish to withdraw the case. Some will attempt to persuade the victim in terms of her social responsibility to others who may be assaulted in the future, but as one put it, "I don't want to be a party to pain and won't use official sanctions."

Opinion is fairly evenly divided as to whether the victim's experience in the criminal justice system is less traumatic or harrowing than in the past. Several who feel things have improved immensely attribute this not to the legislation but to changing attitudes and the fact that police in most jurisdictions, are better trained to deal with

sexual assault victims. However, as noted earlier, there is also the view as one crown attorney explained, everyone, but particularly defence lawyers, is intimidated by the legislation and there is less tendency to attack the victim. Those less convinced that things have improved pointed out that even with the restrictions on raising the victim's past, it is still the adversarial process and cross-examination that is always traumatic for a witness. It was also noted that abrogation of the rule regarding recent complaint has, if anything, worsened the situation for victims who did not delay in making a complaint.

All the crown attorneys had experience or heard of cases where the complaint was unfounded or fabricated. As one explained, it is usually cases where a polygraph test might be requested. In his view, such cases fall into a pattern: "a young girl goes to a party and arrives home late obviously [sic] having had sexual intercourse. She fabricates a story in order to deal with her parents." These are rare cases that are likely to be withdrawn and the complainant charged with public mischief.

Factors taken into account in recommending sentence are not perceived as any different in sexual assault cases than in other cases. That is, crown attorneys take into account the severity of the assault, the frequency and duration and the amount of violence and injury involved and the physical and emotional damage done to the victim. In terms of the defendant, the important factors include his or her past record and indication or lack of indication of remorse or guilt. And, as in other cases, some mentioned the importance of sending a message that certain kinds of behaviour will not be tolerated. Finally, with respect to sentences, several noted that no crown attorney is ever satisfied with sentencing. As one commented, sentences, in general, and not just in sexual assault cases, were much stiffer in the 1960s than at present.

As noted at the beginning of this section, crown attorneys are, on the whole, satisfied with the legislation but generally feel it was a mistake to have done away with "recent complaint." While most could not think of legislative changes they would like to see implemented, one crown attorney would like to see in-camera hearings; another crown attorney wants it possible to tell the jury that the crown does not have the right to call the accused or present any evidence the accused provided. The main nonlegislative change mentioned is the need for more specialized service to deal with sexual assault cases, especially child cases. As five or six crown attorneys pointed out, the main issue at present is the Charter of Rights which has put all criminal law into upheaval. This is seen as going beyond any particular legislation and will take years to work out its implications.

4.5 Interviews with Judges

In all, nine judges were interviewed in Fredericton and Saint John. Seven sit on the Court of Queens Bench (CQB) while two sit on the Provincial Court (PC). The

CQB judges said that 15 to 30 per cent of their caseloads are made up of criminal matters, except for one who sees an especially high number, 50 per cent. The Provincial Court judges, have a 100 per cent caseload of criminal matters. The Superior judge who sees a high percentage of criminal cases was not sure how many cases he sees under s. 246 per year but did state he sees a lot (mainly cases involving children). The other CQB judges see one or two sexual assault cases per year while the PC judges see 55 to 60 cases each year.

All judges, when asked if they saw any changes in the type of cases they were seeing since Bill C-127, mentioned the dramatic increase in cases with child victims. It appears that these cases are often incest cases, or concern sexual assault within the family. One of the CQB judges remarked several times on this tendency and feels that it may be related to remarriage, or families where a nonbiological father (e.g., stepfather, mother's boyfriend) moves into the home and assaults the children. Most of the other judges feel the rise in child cases is due to greater disclosure of child sexual abuse as a result of improved education and better investigation. None attributed these changes to the new legislation. As one senior judge put it:

> It (Bill C-127) hasn't made a damn bit of difference. Rape comes out of the wisdom of ages but if they (women's libbers) wanted to get rid of it, that's fine with me. But it doesn't change anything. Even before the legislation, I always asked defence why they wanted to bring up the past of the complainant. Prostitutes can be raped just like anybody, so what was the point? And, anyway, in New Brunswick the jury will know all about the past character of the complainant.

Other than cases involving children, these judges feel they are seeing basically the same cases as before Bill C-127 came into force; only the charges are different. Most recent cases would have been prosecuted earlier under the old rape or indecent assault laws. Of the nine judges, only one has seen a case involving a married couple coming under Bill C-127. The reason for this may be that a peace bond is issued instead of charges being laid, or there is also physical assault which results in laying of a charge for assault causing bodily harm instead of sexual assault. Cases involving members of the same sex or where the victim is a prostitute have been either very rare or nonexistent in the experience of these judges. There have also been very few classic cases of a stranger sexually assaulting an adult. One PC judge and one CQB judge had not seen a case like this for the past three years.

Most judges have problem defining the term "sexual" during a case. Some feel that "sexual assault" should have been defined in the legislation. When they instruct the jury, they tend to let the jurors decide for themselves how to interpret this term. Many judges mentioned the Chase case and those willing to present their own definitions suggested that it means behaviour of a sexual nature, with an ultimate goal of sexual

gratification, and/or involving sexual organs.[8] Most judges believe the term sexual assault gives police and crown attorneys more leeway in laying charges; it is a wider definition with more room for interpretation. Two judges were unhappy about the deletion of the word rape because it is still in common usage and the term sexual assault downplays the importance of rape as a crime. None of the judges could comment on the definition of "bodily harm" except in theory; they had all only seen cases of simple sexual assault.

Judges were fairly divided on the question of whether it is easier under the new legislation to get a conviction. Three had no opinion, although one did remark that it is always "easier" for the crown attorney than for the defendant given the difference in resources available to each. In the Provincial Court, the accused tend to plead guilty to most charges under s. 246. One judge attributed this fact to a better police investigation, Bill C-127, and the likelihood of getting a stiffer sentence when the victim testifies.

Judges were also asked to rate a list of factors as important, unimportant or neither when getting a conviction, since passage of the new legislation. Penetration stood out as having no importance whatsoever. As one judge asked, "What purpose did it (penetration) serve? What message did it give out?" He has a high respect for the jury system and believes that a jury can see through the case. In his mind, jurors do not need to know about penetration. The rest of the factors, however, were seen as having some relevance in cases by most judges. Many of these concerned questions of "reasonable doubt" and "credibility." The informants were saying that a judge must instruct the jury, or reach his or her own verdict, based on the determination of reasonable doubt. All of these factors are useful in making this determination (e.g., the character of the complainant and accused, the situation in which the incident occurred, as well as the amount of corroborative evidence). With the change under Bill C-127, these factors are less likely to be singled out as crucial. Instead, they all get weighed in determining the verdict.

Eight of the judges feel there is no change in the amount of discretion a judge has in any particular case. The other judge commented that discretion has increased due to the abrogation of recent complaint because crown counsel has more latitude in determining how to proceed; and it is easier for a judge to charge the jury.

There was general agreement that the new restrictions on evidence are appropriate, but several did comment that this type of evidence will still influence the

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[8] The Chase case, as mentioned earlier, ruled that a woman's breast is the equivalent of a man's beard, and therefore not to be considered a sexual organ. This case was later taken to the Supreme Court of Canada and the ruling was overturned.

outcome of a case. Recent complaint was the only type of evidence seen as inappropriate. This was stated by only one judge.

Only two judges presided over a case where the defence attempted to introduce evidence regarding the complainant's past sexual history. One allowed this evidence to be admitted and the other did not. The one who did allow it stated that the defence had proven it was relevant to the case but said that he would not allow the defence to go on a "fishing expedition." Most judges feel there may be a rare case where this type of evidence should be admitted (e.g., to establish credibility or present the history of the accused).

Two judges feel that in-camera testimony is never warranted. The others feel that it may be appropriate in certain cases (i.e., if the victim is very young, or the presence of observers is psychologically damaging to the victim). Most however, are quite reluctant to preside over a trial with the court had already closed.

Only one judge believes that the victim's sexual assault experience in court has become less harrowing due, to Bill C-127. He feels that there has been a tremendous change; the new legislation helps preserve the dignity of the victim and the accused. Another judge commented that the experience of testifying was the most traumatic thing that could happen to anyone. Victim support services were often seen as the most important factor listed as contributing to a positive change. Most judges also believe that protection of the victim's identity is useful. Fredericton and Saint John, however, are relatively small communities and, as some judges pointed out, it is virtually impossible to conceal a victim's identity.

Judges were presented with a series of statements concerning Bill C-127 and asked to rate these statements in terms of whether they agreed or disagreed. All of the judges disagreed with the statement that the new law violates the defendant's right to a fair trial. There was also a consensus that the spirit of the amendments is not being ignored or circumvented in the courts today. On the rest of the issues, however, they were fairly evenly divided. Some feel the amendments were unnecessary because earlier statutes were adequate. There is disagreement whether the new bill has extended protection to women who were, under the previous legislation, effectively considered "unrapeable." They were also divided on whether the focus has shifted from the sexual aspect to the assault-related aspects of the offence (i.e., the bill simply brought the law in line with current public and official attitudes) and whether further changes to the legislation are required.

One-half of the judges interviewed feel that the Charter of Rights and Freedoms has had no impact on the way sexual assault cases are handled. The others, however, feel that trials in all cases now take longer and the rights of the accused now need to be

taken into consideration far more than in the past. One stated that judges always have charter problems to deal with, in all cases.

Other comments made by judges included issues such as the "law needs some fine tuning". For example, there is a need for clarification in respect to indecent assault and the age of the complainant. Two judges feel that victim-impact statements could be useful in sentencing, even with a guilty plea. These cases are seen as very tough. One judge stated that it is very difficult to get a conviction in adult cases. In general, though, the new legislation is viewed positively despite one judge's view that "judge shopping" and "plea shopping" sometimes occurs. Sexual assault fits better into the Criminal Code; it is much easier for the victim to testify and for crown counsel to present its case. One criticism of the new bill, stressed very strongly by two of the judges, was the use of the term "complainant." They think it suggests an adversarial relationship between the complainant and the accused when, in fact, it is the crown counsel that lays the charge. They feel the chance of conviction may be reduced, if the jury is affected by the implication that it must decide between the complainant and the accused. They also suggested that this word has negative connotations such as "whiner" or "bitch." They suggested that a more appropriate term would be "victim of the assault" or "alleged victim of the assault." Overall, they do seem to like the bill.

4.6 Police Interviews

Interviews were conducted with nine police officers in Fredericton and Saint John and four RCMP officers. Three of these officers are women. The range of experience is from five to 27 years of service. While all deal with sexual assault cases and most have had some training in dealing with these cases, each individual, will deal with from five to twelve adult cases annually. As with other informants in the criminal justice system, most of the sexual assault caseload is made up of child cases.

These officers are divided in their assessment as to whether there has been any change in the type of adult cases reported to the police. Five of the eight believe that there are more complaints in which the complainant and the accused are married to one another and also in cases where both are of the same sex (male); the other five officers do not believe there has been any change. All are agreed that cases involving prostitutes are extremely rare in New Brunswick. Most (11 out of 13) believe that there has been a dramatic increase in cases involving children.

There are also differences in police officers' assessment of whether there has been any change in unfounded cases and rates of conviction. Four believe that there has been an increase in unfounded cases and attribute this to increased reporting of assaults where alcohol or drugs are involved and increased reporting of child abuse cases. In the former, as one pointed out, police may well believe that an offence occurred, but

because of incoherent accounts by victims, it is difficult to obtain sufficient details to warrant the laying of a charge. In the case of child victims, heightened awareness of child abuse has, in another officer's view, led to reporting of cases that are difficult to substantiate evidentially.

A majority, eight of the thirteen interviewed, believe that the conviction rate has increased and attribute this to changes in evidentiary requirements in Bill C-127. Various officers noted that the lower sentences for s. 246.1 offences has made it easier to obtain a conviction than under the former rape laws. As others pointed out, there is less stigma attached to sexual assault; this makes it appear, psychologically, a less severe offence than rape. At the same time, as one often noted, offenders may take the offence less seriously, particularly if they may be treated better by other inmates than if they were labelled as a rapist.

Police officers generally hold a view of sexual assault that is in accordance with the new legislation. That is, most see sexual assault as any unwanted touching or grabbing of sexual organs or private parts of the body, including breasts, by someone seeking sexual gratification. All but one officer felt that a consequence of the new legislation was that it broadens the definition of what is meant by "sexual".

Estimates of the proportion of reported fabricated cases varied widely from three to 50 per cent. The majority (eight officers) believe that less than 10 per cent of cases are fabricated. The higher estimate came from three officers who had been recently involved in cases at the local university which were conclusively found to be fabricated.

From the point of view of the police, Bill C-127 has not brought about changes in rules or procedures, at least with respect to adult cases. As some pointed out, whether it is called rape or sexual assault, these cases take more time than other criminal cases. However, the investigation proceeds much the same since, to a large extent, the procedure for adult cases had already been set; the only thing that has changed is that the court puts weight on different matters than it did before. Other developments, including more training for police officers, greater sensitivity to the needs of the victim and use of the rape kit were changes that either preceded Bill C-127 or were in the process of being implemented.

As we have mentioned at various points, the metaphors of a "filtering process" and a "crime tunnel" are widely used to explain the process by which the majority of criminal offences never result in a prosecution and a sentence. To change and to mix metaphors for a moment, it is apparent that the police are important "gatekeepers." It is their decisions and activities about a given complaint which, in part, determine whether a case goes forward for prosecution or is simply filed away. Aside from the obvious need for an identified offender, there is the question of what kinds of complaints are likely to be defined as founded and unfounded. We posed a number of factors to our police

informants and asked which were important, which were unimportant and which were neutral. While we are obviously not dealing with a large number of interviews, Table 29 tabulates the responses in numbers rather than percentages. What is apparent in this table is that police officers are divided on the importance of various factors in determining whether a case is founded or unfounded, but are in close agreement about the importance of other factors.

Table 32 Importance of Factors in Determining Founded Cases

(Numbers)

Factor	Unimportant	Important	Neutral
Relationship between complainant and offender	6	4	3
Age of complainant	5	7	1
Character of complainant	7	4	2
Elapsed time between incident and report	4	8	1
Previous record of accused	5	6	1
Corroboration of complainant's story	1	12	-
Alcohol or drugs involved	4	6	3
Situation in which the incident occurred	2	9	2
Use of a weapon	1	12	-
Unresponsive or uncooperative complainant	2	11	-
Injury to complainant	1	11	1
Proof of penetration	4	6	3

It would seem that recent complaint, corroboration of the victim's story, a cooperative complainant, use of a weapon and evidence of injury to the victim are factors predisposing virtually all police officers interviewed to view a complaint as founded. As the table suggests, police officers differ in their views as to the importance of various factors (i.e., relationship between the complainant and the offender, whether there was penetration, age and character of the complainant etc.) In short, a victim making a complaint to the police can be sure of being believed (or disbelieved) if certain factors are present in his or her case. But for other fact situations, the likelihood that the complaint will be viewed as founded or unfounded may well depend on which officer or officers deal with the case.

Police accounts verify what we had learned already: polygraph tests of victims and/or accused are used very rarely. To order such a test involves a fair amount of paperwork and bureaucracy. Both RCMP and city police must obtain authorization from higher levels and to do that, the request must be justified. The result is that polygraph tests are resorted to only when there are "gross discrepancies" or contradictions in the accounts of the two parties and when there is no corroborative evidence.

The general view of these officers is that a refusal on the part of the victim to submit to a polygraph test will increase suspicion as to the validity of the complaint. While some would see refusal as grounds to conclude the file, others would carry on the investigation until, in their judgement, there was insufficient evidence to continue the case. At the same time, as three officers also commented refusal does not mean the victim is lying (although it may be construed that way in court); many victims refuse polygraph tests on principle.

Answers to the question of what happens when a victim fails the test were largely theoretical and speculative rather than based in experience. Most felt that failure to pass the test would constitute grounds for concluding the case and, if there was sufficient evidence, for laying a charge of public mischief. However, this was also qualified by suggesting that it would be necessary to take a longer and harder look at the case and to have a serious talk with the complainant.

As in other criminal matters, while police may recommend charges, the final authority rests with crown counsel. Most (11 out of 13) prefer to recommend the maximum charge possible; this is easier to do under the present legislation than the previous legislation. The main reason for this preference is that while it is possible to move downward to a less serious charge, once a charge is laid it is impossible to go in the opposite direction. Thus, if there turns out to be insufficient evidence to sustain a maximum charge, the option remains to proceed with a lesser charge.

Not surprisingly, most officers see the major difficulty in obtaining conviction in a sexual assault case is the lack of corroboration with clear and detailed evidence.

However, a majority (9 out of 13 officers) also mentioned that victims can be a problem in many instances. Some are reluctant to testify or to provide sufficient detail. Others, for various reasons, are unable to testify in a way that is convincing to judges and juries, or they do not fit the stereotype of the chaste woman and, therefore, lack credibility in the eyes of some judges and juries.

There is nearly unanimous agreement among police officers that, under the present system, things are better and less harrowing for victims than in the past. While some felt there are a number of factors that are important in changing the situation for victims, there was unanimity regarding the restriction of the complainant's past sexual history. At the same time, several officers also commented that while things may be better, the victims must usually testify in court and this will inevitably be traumatic and embarrassing in sexual assault cases.

In response to various statements about Bill C-127, there was a high degree of unanimity (10 - 11 out of 13) on four of the statements and more divided opinion on the other three. There is general disagreement that the new law violates the defendant's right to a fair trial, that the amendments were unnecessary, and a similar level of agreement that the legislation has extended protection to women previously considered "unrapeable" and that Bill C-127 simply brought the law into line with public and official opinion. Officers were divided as to whether the spirit of the amendments is being ignored or circumvented in the courts, as to whether the legislation has shifted the focus from the sexual to the assault-related aspects of the offence and, finally, whether further changes to the legislation are required.

As with other informants interviewed, police officers were asked for any final comments on how sexual assault cases are treated in the criminal justice system. While those who responded focused on several issues, most reiterated their view that things have improved for victims of sexual assault. As these police officers noted, victims are treated more like victims and not accusers; this enables them to come forward with a complaint. However, along with satisfaction with the legislation and its consequences is dissatisfaction among some about sentences which most consider are frequently too lenient. Several also pointed out that, in most jurisdictions in New Brunswick (except Fredericton), there is a need for more specialized training of police, victim programs and follow-up services for victims who have been through the court process.

4.7 Victim Witness Workers

Two victim witness workers were interviewed, both of whom began working in the victim witness unit in 1983. Neither of these workers received any special training or instruction for their positions. Nor did they receive instruction on particular aspects of the new legislation, which was already in place when they began. One of the workers

mentioned having some vague knowledge about the legislation, gained from overhearing conversations about how it would change practices. Both of the workers felt that some training would have been useful.

One worker is based in Saint John and the other in Fredericton. The Fredericton worker sees about twenty women a year although she sees others in a more unstructured fashion. The worker in Saint John said that she sees 12 to 25 victims during a "heavy" year. (This number includes child victims as well as adults). One worker had been involved in only one fabricated case, while the other had serious doubts about a few. However, the second worker stated that even with doubts, she will proceed until she has concrete reasons to feel differently. One estimated that less than 10 per cent of reported sexual assaults are fabricated. The other victim witness worker estimated less than five per cent.

Both workers feel the police process is very traumatic for victims. One noted that a victim must often give account of the assault two to three times immediately after the offence occurs. For example, she may have to retell her story to the physician and for the official statement, after having already given an account to a police officer. The worker feels this process makes it difficult for the victim to insert additional details into her account that she may remember later on. Immediately after the offence, a victim may be in a poor emotional state, if not a physical one, thus not able to recall everything. She stated that victims should be given a full explanation of how statements should be given and allowed more time to do so. In general, this worker stated that police officers should receive special training for taking statements. She also stated that police treatment of victims depends on which officer is involved. The other worker stated that the whole reporting process, including the collection of evidence at the hospital, is traumatic for the victim, there is no way around it. She also stated that the process is quite fatiguing and if the police officer feels that the victim is too tired to continue, some parts of it may be delayed so that the victim may rest.

Another area of the police process considered difficult is the length of time it takes to investigate the complaint, especially when the police officer has a number of cases. It takes time for witnesses to be contacted and it is often hard for the victim to wait for the offender to be arrested. The gathering of physical evidence can also be traumatic for victims (e.g., the taking of a pubic hair sample). Victims are often examined by doctors and nurses they do not know. One worker said victims should have the right to call their own doctors and deal with a female police officer. One worker has heard of cases where a male police officer was present in the room during examination of the victim.

With regard to crown counsel, one worker stated that victims often worry that the crown attorney has not spent enough time with them and on the case. The other worker, however, stated that the crown attorney does spend a fair amount of time with the

victims (i.e., contacting them three or four times by the time of the Preliminary Inquiry). She said the crown attorney's role is not to worry about whether the victims perceive them as caring. Their job is to prosecute the case. She said that generally victims are grateful for how the case went.

One worker feels judges usually treat victims well and with empathy. This worker is concerned however, with the usually long time lapse between the victim's decision to proceed and the case reaching the court. She also stated that testifying in open court is traumatic for victims. The other worker feels there is a problem with the whole court process because it does not link to the victim's recovery process. Another problem is the embarrassment victims sometimes feel when evidence is presented in court. One example cited was a case where the victim's panties were held up in the courtroom.

Both workers think that the victim's experience of the criminal justice system has become less traumatic in the last five years. One, however, felt this difference was small and was not necessarily due to the change in legislation. Rather, she attributed the slight improvement to other factors (i.e., more centres offering victim witness programs, people being more sensitized to the issue, and the fact that sexual assault is becoming more socially unacceptable as a behaviour and an offence). She also stated that although some people may still hold the same views as before -- for example that the victim is at fault -- they are unlikely to say so because of the reactions of women and women's groups.

Both workers consider several aspects of the case to be important for effective prosecution. One is the sexual history of the victim. One worker said that victims often ask her about this. She feels that defence lawyers ask devious questions in order to get this information, especially in a jury trial. This worker believes that juries are very judgmental and the concept of a chaste woman is still very powerful. Recent complaint is also viewed as important despite its abrogation. One worker said that crown counsel still rely on this factor to be favourable to the case. However, the other stated that abrogation of this rule has been especially important for incest victims. They now have legal recourse even when the offence occurred in the past. Both workers also stated that corroboration is important in sexual assault cases. One stated that it brings more cases to court, but it also puts more pressure on the victims. If it is a judge-and-jury trial, lack of corroboration is seen as a chance to get the offender off. She said that the "best" victim is still a beaten up virgin who has a recent complaint. The other worker feels that corroboration is important in that if the victim is believed, it is empowering for her.

One worker spoke about the time spent in preparing adult victims for the court experience. She said a minimum of 10 hours is spent with each victim, but less than two hours of that time is spent in court preparation. Later in the interview, she stated that the trial would be less psychologically traumatic for victims if jury trials used closed circuit television. The other stated that the most important part of the court process for

the victim is to be well prepared. The better prepared she is, the better witness she makes. She said that when defendants take the stand, it is certain that they are well prepared. She fears that victims are told testifying is not too bad and then, when they get to court, this is not so, especially during the cross-examination which she sees as doubly victimizing. She feels that the system needs to be improved with regards to preparing victims for court. Victims are often not referred to victim witness workers by crown counsel until shortly before trial.

Both workers also feel that changes in the legislation dealing with protection of victim identity have been important. One feels that judges are now more likely to order a ban on the publishing of facts/evidence of a case. This is a mixed blessing because it prevents the public from being aware of the horrendous things the offender did. Moreover there is concern for the protection of a victim's identity. People often assume they know who the victim is (given the size of the communities) when they learn the facts of the case.

These workers were also read the list of statements included in all the interview schedules. Given that only two workers were interviewed, an analysis of their responses (agree/disagree) is rather meaningless. Of more interest were their comments after going through the exercise. They both saw some changes that could improve the system. One saw a need for more victim witness workers and more advocacy groups outside the criminal justice system who will speak on the issues. She also sees a need for more social change, in particular public education programs starting with school children. She recognizes, however, that this would take a long time. The other worker feels that victims should be encouraged to take civil action against offenders as is done in the United States, because she thinks that if offenders have to pay money out of their own pockets, it may have more of an impact. She also feels that proper accommodations should be provided so that offenders would receive more appropriate sentences. She thinks their sentences are often not long enough. As well, she said that if the state was really serious about rehabilitation, more money would be put toward it.

4.8 Sexual Assault Workers

The Fredericton Rape Crisis Centre has been providing counselling and support service to victims of sexual assault since 1975. Currently the centre operates as a "collective" made up of volunteers and one full-time paid staff person. All have an equal say in the policies and practices of the centre, and all decisions are by consensus.

To work at the centre, each volunteer must participate in a training program, consisting of 10 sessions (about 30 hours) put on by the centre. The topics covered are of a theoretical nature (e.g., discussions of feminism, sexism, myths and facts about rape) and a practical nature (e.g., skills in counselling, the current legislation). As part of their

training, volunteers also visit the hospital and meet with representatives from the police and the crown attorney's office to get a better understanding of how the criminal justice system operates. From the volunteers' point of view, such training provides them with confidence and is extremely important and useful.

While we hoped to interview sexual assault workers who had experience with the previous and current legislation, this was not possible. Currently there are no volunteers at the centre that were there prior to the introduction of Bill C-127. As well, there has recently been a turnover of volunteers, thus, not many workers currently involved with the centre have had much experience.

In total, we interviewed four volunteers, all of whom have been with the centre for at least four months, with the longest having been there for five years. According to what we were told, it appears that, on average, each worker is involved with 10 to 12 sexual assault cases per year.

In general, sexual assault workers felt the new legislation has had a positive impact on how complainants are being treated by the criminal justice system. There was unanimous agreement that the changes in evidentiary rules brought about by Bill C-127 were most appropriate. All felt it appropriate that evidence concerning the victim's reputation and past sexual activity be restricted. As well, they supported the abrogation of the rules regarding recent complaint and the removal of the requirement for corroborative evidence.

There was divided opinion, however, on the extent to which the trauma experienced by the victim has been minimized by the new legislation. Two of the volunteers thought that the victim's experiences with the criminal justice system had in fact become less traumatic or harrowing, while the two others felt that not much has changed for the victim in this respect. In their opinion, trauma is inherent in the nature of what the victim has to go through. As one of the workers explained, the procedures, by the way they are structured, make it traumatic, even though people involved in the criminal justice system may be more sensitive and aware. However, the change in evidentiary rules, as well as better preparation of the victim for trial and protection of the victim's identity, were seen as positive steps toward decreasing the trauma involved. Yet, as two of the workers pointed out, traditional attitudes and myths surrounding sexual assault are still prevalent and often counterbalance the positive effects that have been achieved.

Because of their limited experience, two of the volunteers were unable to comment on what they perceived as the major differences brought about by Bill C-127. The two others both mentioned the removal of penetration and spousal immunity as important differences. One also mentioned that changes in rules of evidence were important, but went on to say that in her opinion, questions about the victims past are

still coming out and attempts are still made to discredit the complainant. There was some difference of opinion as to whether the new legislation affected how police classified complaints. One worker felt that there was no difference while the other two felt that more complaints were now being treated as "founded".

The general perception among the workers is that the term "sexual" is being defined broadly by the criminal justice system to include anything dealing with sexual parts of the body. Mention was made, however, of the "Chase" case in which the New Brunswick Court of Appeal ruled that "breasts" were secondary characteristics like men's beards.

Although their experience with court cases is limited, all but one worker felt it was easier for crown counsel to obtain a conviction now (partially because of the broader definition of sexual). However, all felt factors that were important in obtaining a conviction prior to the change in legislation continue to be important. The following examples were mentioned:

a) the relationship between the complainant and accused (the perception is that when the offender is a stranger it is easier to get a conviction);

b) the background or character of the complainant (the notion of the chaste woman is still prevalent);

c) the elapsed time between the incident and the report (if the victim waits, either the evidence may be lost or there is some question about how traumatic the experience really was);

d) the previous record of the accused (this affects the offender's credibility);

e) the corroboration of the complainant's story;

f) if the victim has used either alcohol or drugs, she is seen to have less credibility;

g) the situation in which the incident occurred (the victim who is leaving a bar and drunk is seen differently from one who was assaulted while she was home in bed asleep);

h) whether or not a weapon was used is considered to be an issue;

i) injury to the complainant is seen as important corroborative evidence; and

j) three of the four felt that proof of penetration was still an important factor (the offence is seen as more serious when there is penetration).

The volunteers felt that while some of the above mentioned factors may play a less significant role now in specific instances, they nevertheless believe they are important in determining how the case as a whole was viewed and treated within the criminal justice system. They believe that some changes had taken place, but more improvement was needed.

As with other informants in the criminal justice system and related agencies, we asked our sample of volunteers at the rape crisis centre whether they agreed or disagreed with a series of statements about Bill C-127. While there were some differences in their perceptions, in general their assessments were very similar. All disagreed that the new law violates defendants' rights to a fair trial. They felt the amendments were necessary; earlier statutes were inadequate and further changes to the legislation are still required. There was some disagreement as to whether the spirit of the amendments is being ignored or circumvented in the courts. The general feeling is that the bill has extended protection to women who were effectively considered as "unrapeable" under the previous legislation. As well, they believed the focus had shifted from the sexual aspect of the offence to the assault-related aspect.

As suggested elsewhere, there is reason to believe that individuals who seek the services of a rape crisis centre are not necessarily the same ones who approach the criminal justice system. Therefore, it is not surprising that the change in legislation has not altered the centre's polices or procedures, nor does it seem to have had much impact on the sorts of cases that are reported to the centre. As one of the workers stated, "people generally come to the centre for different reasons (for example, as the result of personal trauma) than the justice system."

They do however, feel the centre is receiving more reports that do not involve penetration. There has been an increase in the number of wives who report and an increase in "date and acquaintance rapes", especially by younger women. The centre has received very few calls where the complainant and assailant were of the same sex, although there has been a definite increase in the number of cases reported by a victim under 16.

The centre's basic philosophy is that volunteers are to remain "objective". It is up to the victim to make choices about what she wants to do. Thus, what the workers tell the victim and the extent to which they inform her about the current legislation, depends a great deal on whether the victim has expressed an interest in making a formal complaint to the police. In such cases, the worker explains the procedures involved at the police and trial stages in a factual, step-by-step manner. The worker would tell the

victim about her "rights" in the criminal justice system and offer her support if she chooses to pursue that route.

As indicated before, from the perspective of sexual assault workers in Fredericton, the changes in legislation have basically been positive in terms of intent and consequences. At the same time, concern was expressed as to whether the "renaming" of rape to sexual assault could be interpreted as trivializing the offence. There was also mention that within the criminal justice system and among the public at large, beliefs and attitudes toward sexual assault victims appear to be lagging behind the change in law. One individual indicated that it would have been helpful if the reform changes had been accompanied by an intensive public education program.

To be a more effective support system for the victim and in order to fulfill the centre's public responsibility, all workers felt strongly that the centre needs to provide other services. The problem however, is lack of resources. The mentioned services include the need for more educational and resource tools; more time for public education; the use of a "toll-free" number that would be available to victims in all parts of the province; and the importance of having services available in both official languages.

They would also like to see the services expanded by having volunteers available throughout the province as well as more permanent staff (i.e., especially trained counsellors to follow up cases and do long-term counselling as opposed to relying on the short-term crisis intervention treatment currently provided by the volunteers). There was also mention of the desirability of self-help groups for victims, and housing facilities for women and children who have been sexually assaulted or threatened.

4.9 Physician Interviews

Victims of sexual assault seek medical attention generally for one of two reasons: either penetration has occurred and the victim is concerned about pregnancy or sexually transmitted diseases, or the victim has been physically harmed. In both circumstances, if the victim reports the sexual assault to the police she or he is strongly advised to go to the hospital, usually the emergency department, so that potential evidence can be collected. How physicians treat sexual assault victims and what their attitudes are towards both the victim and the legislation is of interest to this evaluation.

During our review of police files, we identified eight Fredericton physicians who had some contact with victims of sexual assault. However, due to doctors unpredictable schedules, we were able to interview only two physicians. One of the two doctors deals primarily with child sexual abuse cases. Although our information is limited, we do,

nevertheless, have a better picture from our interviews of how victims are treated and how the legislation is perceived.

In terms of their overall practice, doctors' experience with sexual assault cases is limited. One of the doctors, who works in the emergency department on a regular basis, in addition to his regular practice that is now centered around the university, sees 10 cases per year on the average. Of these, however, only two or three cases involve the victim coming in and reporting they have been sexually assaulted. More typical from his experience is the situation where the fact that the victim has been sexually assaulted comes to light in the context of other problems the victim may be having. Often the assault occurred years ago, and the doctor is the first individual she has told.

However, this doctor also felt that he is not seeing anywhere near the number of sexual assault cases which occur. In his opinion, many victims are reluctant to discuss it with anyone. They want to handle it by themselves, or perhaps with the support of a friend. He also mentioned that "date rape" was "very, very common on this campus." As he explained, there are a lot of situations between dating couples where intercourse happens against the female's will, which she does not generally define as "rape" or sexual assault. However, she ends up with a lot of guilt feelings that, in his opinion, can have serious long range repercussions. In many of these cases, alcohol plays an important role and the victim is often ill-prepared with regard to sex education.

For the most part, this doctor sees sexual assault victims in his office. There is no standard procedure he follows. He tries to respond to the physical and emotional needs and wishes of the victim. He attempts to play a supportive role. While he may suggest available professional services he does not tell the victims what they should do. Nor does he actively encourage the victim to report to the police or call the rape crisis centre. It is interesting to note that he mentioned that victims generally tell him that they do not want to report to the police.

In his experience, very few cases of sexual assault come to the emergency department of the Fredericton Hospital. In the last five years, he has only used the sexual assault kit twice. However, he did point out that the emergency room staff are briefed on what the kit contains and what procedures are to be followed. They are also instructed to use the kit if there is any remote possibility that this case could go to court. Although he recognizes the need for the sexual assault kit, he finds the whole procedure very impersonal and inhumane, one which does not allow him to deal with the victim's feelings.

Who stays in the room during an examination of a sexual assault victim would depend on the circumstances. He would have a nurse present, but if the victim were accompanied by a counsellor or a relative, that individual would be allowed to remain in the room. In his experience, the police are not physically present in the room.

During his 19 years of practice, this doctor has never had to testify in court. This differs significantly from doctors who deal with child abuse cases. For example, the other doctor we spoke to has testified in court twice during a three year period, although one instance involved a 23 year old "mentally handicapped" victim. He thinks that his experience of having to testify in court is low for physicians who deal with child abuse cases. While he is one of three physicians in the city who are called on to deal with child abuse cases, the majority of such cases are handled by the other two doctors who, as he has learned, spend considerably more time in court.

Both doctors felt that, in general, changes brought about by Bill C-127 were positive. As they saw it, a major difference between the old and new legislation is that penetration is no longer the key factor and that the term "sexual" is now defined broadly. They also felt that there is increased recognition that a sexual assault, of any degree, can have serious emotional effects on the victim.

While neither seemed very familiar with the specifics of the legislation and its implications, the two doctors had quite different perceptions of how it was working. For example, one basically agreed and the other basically disagreed that the new law violates the defendant's rights to a fair trial; the spirit of the amendments is being circumvented; the legislation has been unsuccessful in shifting the focus from the sexual to the assault-related aspect of the offence; the passage of Bill C-127 has extended protection to women who were previously considered unrapeable, and the legislation simply brought the law in line with public and official consensus about sexual assault. However, both disagreed with the statement that the amendments were unnecessary since the earlier statutes were adequate to deal with the crime. Both doctors also agree that further changes to the legislation are required.

When asked whether there should be restrictions on the type of evidence allowed in court concerning the complainant's sexual reputation and sexual activity with other than the accused, one doctor felt there are certain circumstances where this may be justified. In his opinion, there are cases where the defendant is innocent and the complainant is using the system to get back at the defendant.

Since the change in legislation, one doctor has seen some sexual assault cases between fiances and married couples, but only one case where the complainant and assailant were of the same sex (both male). However, he does feel that with the new legislative changes more people are coming forth, especially wives. Not surprisingly, the other doctor (who sees primarily child sexual abuse cases) feels that now there are more cases involving victims under 16; he attributes to this a greater awareness of the problem, coupled with successful prosecution.

When asked how, in their opinion, things could be made better for victims of sexual assault, both stressed the need for more education and training for people at all

levels who deal with victims, including people in the criminal justice system and counsellors. Both doctors spoke of the need to make it easier for victims to reach out for help - to create a climate where the victims' fear of reporting and sense of guilt is minimized.

One doctor stressed the need to consider preventative measures, such as teaching young people better communication skills, and teaching males how to deal with their sexual feelings and sexuality in more appropriate ways.

5.0 VICTIMS AND THE CRIMINAL JUSTICE SYSTEM

5.1 Introduction

Chapter 4.0 describes the perceptions of those, who as a result of their position in the criminal justice system or their profession, deal regularly with victims of sexual assault and those who are accused of these offences. In this final section we describe what victims themselves have to say about their experience. We also describe the few trials of adult cases that have taken place in the two jurisdictions over the past year.

5.2 Interviews with Victims

A central focus of legislative reform was the victim. The intent was to make the criminal justice system more sensitive to the victim's needs; this, in turn, would increase victims' confidence in the system. The new evidentiary rules were to make the victim's experience in court less harassing and intimidating.

5.2.1 Gaining Access to Victims

To assess whether the legislation achieved any of these aims, information was needed on the victim's experience and perceptions of the criminal justice system. However, we knew this would be a most difficult and sensitive part of our evaluation. First, we were aware that many victims would be unwilling to "relive" their experience for the benefit of social science research or for some general claim that knowledge of their experience may help future victims of sexual assault. Second, we were faced with the difficulty of gaining access to victims for our sample.

It was evident to us, for a variety of reasons, that we could not expect the Fredericton Rape Crisis Centre to put us in contact with victims. This left us with police and court files as potential sources for respondents. As well, we were faced with the ethical and methodological question of how far back in time we could ask victims to recall their experiences. There was also the mechanical question of how one would contact these individuals.

We received permission from the police to take victims names from the files. Thus the names of the majority of our respondents were obtained in this way in both Fredericton and Saint John. For methodological and ethical reasons, we made the decision not to attempt to make contact with victims who had reported prior to 1985. In both cases, the victim witness worker made initial contact with the individual and asked whether she would be willing to participate in the study. If the victim agreed, her name and phone number was passed on to the principal investigator who in turn set up a time and place for the interview.

We received tremendous cooperation from both victim witness workers in our attempt to find potential respondents. However, their efforts were not always met with great success. First, there was the difficulty of finding where these victims now lived. Many had moved and left no forwarding address or phone number. Second, there was a problem of getting willing participants. In total, we were able to obtain five names in Saint John and five in Fredericton through this process.

In addition, we considered other ways of increasing the number of potential respondents. Specifically, we made an appeal through some of the media in the Fredericton area for women (and men), who have experienced but not necessarily reported a sexual assault to make contact with us. As well, we placed posters in public areas (downtown stores, malls, doctors offices, university buildings) asking people to contact us. Other channels were also used, for example, word-of-mouth, informal contacts, and a verbal appeal at a "Take Back the Night" march. While we were disappointed by the response to these attempts, we were able to make contact with another seven victims through this process. There were also others who contacted us whom we did not interview because the assault occurred before they were 16 years old.

In total we were able to interview 17 victims. Thirteen of these reported the case to the police and four did not. Of those who did report, 10 cases went to trial; in the other three the police were not able to find a suspect. Due to the manner in which we obtained our sample, we do not claim that the views of our respondents are necessarily representative of all victims. In fact, there is some reason to believe that the victims contacted through the Fredericton police who agreed to be interviewed may be different from the ones who refused. According to the victim witness worker, the victims who experienced more "serious" forms of assault did not want to participate in the study. We do not know, of course, whether this was due to emotional trauma they experienced or whether this was a reflection on their feelings about the criminal justice system. This pattern was not true for Saint John.

In general, there is little first-hand knowledge about the real experiences and perceptions of sexual assault victims. One reason for this, as Clark and Lewis (1977) point out in their study, is that victims are frequently unwilling to be interviewed. At the same time, from the point of view of this evaluation, the victim's perspective is critical. Therefore, in the following discussion, we have attempted to provide as much detail as possible.

5.2.2 Reporting

The filtering process begins when the victim decides whether or not to report the assault to the police. Data from the Sexual Assault Centre file analysis suggest that the major reasons for not reporting include fear, intimidation, self-blame and guilt. When we asked the four victims who did not report why they chose not to, we got the same sorts of responses. For example, two victims mentioned that they were afraid, partially

blamed themselves and were ashamed of what happened. They also mentioned that they did not feel that they would be taken seriously by the criminal justice system. One mentioned, for example, that the offender came from an "influential" family and she felt that she would lose. The other felt she would not be believed because she was a single parent. One victim felt the assailant was indeed sorry for what happened, but also mentioned that in her opinion the laws were hard on the victim and frequently it seems that the victim "pays the price". Similarly, the fourth victim was intimidated by second-hand information of what might be involved. She did not report her rape (which occurred seven years ago) because she had read a magazine article in which a police chief commented that if his wife were raped he would not advise her to go to the police. This individual still believes that sexual assault is not taken seriously by the criminal justice system.

It should be noted that in one case, the assault occurred prior to 1983, one occurred in 1983 and two occurred after the change in legislation. In all four cases, genital intercourse occurred and, in all four cases, the victim had at least some knowledge of her assailant.

Although victims are apprehensive about reporting to police, it appears that when they do so, their experiences tend to be fairly positive. It has often been suggested that victims of sexual assault are treated poorly by the criminal justice process. For example, one survey found that "rapes were seldom reported to the police because women who had been sexually assaulted were more often afraid of their treatment by the police and courts than they were of retaliation by their assailant" (see Renner et al., 1988: 164). The police, most of whom are male, are viewed as insensitive to the victim both in their general approach and by the types of questions they asked. Our evaluation, however, does not support such criticism.

With two exceptions, one of whom was critical only of the male officer but not the female, the victims we interviewed were very positive about their treatment by the police. The general perception was that the officers were sensitive, knowledgeable and supportive. Comments were made such as "he was just great", "I couldn't have been treated any better". Our respondents felt the questions asked were, for the most part, "routine", "factual", attempts to find out exactly what happened. They felt the questions were "fair", "necessary" and "relevant", although one victim mentioned feeling some unease when asked "whether she had enjoyed it". Another commented that at one point she felt she was being partially blamed for what happened. Not one victim we spoke to felt the police asked inappropriate questions.

Eight of the victims, or 62 per cent, said unequivocally they felt that the police officers who interviewed them were experienced in dealing with sexual assault cases. They explained that the police were "calming" and gave the victim "time". Another two victims felt the female officers were experienced, but were somewhat critical of the male officers. One victim felt the initial officer who saw her was inexperienced, but felt that he took her to other officers who were experienced. Only two of our respondents

(15 per cent) felt that the police were inexperienced. They felt the officers who interviewed them were either not sensitive or appeared not to care. All of the victims who dealt with the two victim witness workers in Fredericton and Saint John had much praise for the two women.

When victims were asked whether they felt it was worthwhile to report the assault and whether they would advise a friend to do likewise, the opinions were somewhat divided. The majority (62 per cent) definitely felt that it was worthwhile and would recommend doing so to a friend. One individual was ambivalent about her decision because of the "personal and psychological cost" to her as a result of reporting. However, four individuals (31 per cent) felt strongly that it was not worthwhile. But, it appears that their negative feelings stem not from their treatment by the criminal justice system, but rather reflects their feelings about sentencing. All expressed a great deal of anger and bitterness at the "short sentences" given to the offender. In addition, one of the four victims mentioned physical and verbal harassment and threats new experienced by her and her family for over a year after the trial. This was another reason why it was not worthwhile to report the assault (this particular individual was assaulted by four offenders).

Only one victim we spoke to was asked to take a polygraph test. In this particular case, the accused was also asked but refused. The victim agreed to take the test while "under pressure". She did mention that after the results were received, the attitude of the police towards her changed in a positive way.

5.2.3 Medical Assistance

A victim's experience in the emergency department is generally not pleasant. As one of the doctor's interviewed told us, "... these are very difficult cases. It is all so 'objective', because of what is involved. You do not have time to deal with the patient's feelings". As well, the victim is undoubtedly experiencing trauma about the assault and wondering what will happen to her. In some instances, victims may also fear secondary victimization from the medical personnel.

Over one-half of the victims we interviewed (10 of the 17) did not seek or get medical assistance. The major reasons given for not doing so were: "nothing was wrong". Physically, there had been no penetration, the victim had not been beaten or bruised in any serious way. In one case the victim did not seek medical help, since the assaults had been going on for a number of years.

Of the seven who did receive medical attention, all but one had been advised by the police to do so (to check for traces of semen or to get treatment for bruises) or were taken to the hospital by the police. It appears that in such cases the common practice is to use a sexual assault kit. Three of the victims said that a sexual assault kit had been used. Two others were not familiar with the term, however from their

description of what happened (e.g., that all specimens were carefully labelled and the police officers stayed just outside of the examining room) a kit was in fact used. In all cases the examining doctor was a male.

5.2.4 Court Experience

One factor that motivated legislative reform was the criticism made, especially by feminists, of the victim's experience in court. Especially problematic were the rules of evidence which, from the victim's viewpoint, made her feel she was the one on trial. The 1983 reforms included changes in the evidentiary rules pertaining to the issues of consent, corroboration and questions about the victim's past sexual activity. This was intended to make the experience of testifying less traumatic for the victim.

5.2.5 Victims' Perceptions

To determine whether things had changed for the victim, we asked a series of questions pertaining to the trial process. Of the 13 cases that were reported, the police arrested a suspect(s) in 10 cases, all of which went to trial. In only two cases, was there more than one offender involved. In seven of the 10 cases that went to trial, the victim had been sexually assaulted by a total stranger(s). The other three cases involved a family member, an acquaintance and friends. In the three cases where no suspect was arrested, it appears that there was little evidence to go on. In each case, the victim had been "sexually assaulted" by a stranger on the street at night (e.g., her breasts were grabbed or she was briefly fondled). She was able to get away quickly and the assailant fled.

For the most part, our research suggests that victims, while they were nervous, embarrassed and intimidated, did not find testifying in court to be a horrendous experience, overall. All but one victim felt they had been well prepared for the trial by the crown attorney's office. They were informed about what was going to happen and the kinds of questions to expect. In all cases, as far as the victims could remember, there was a ban on the publication of the victim's identity, a practice they saw as very positive and respecting of the victim. In one case, according to the victim, the media arrived with cameras. The judge quickly ordered the cameras to be removed.

One of the difficulties encountered in asking victims about their court experience was that frequently they did not remember many of the details. This was especially the case where there was more than one offender and the victim had to testify in separate trials. Of course this is hardly surprising given the inherently repugnant nature of the offence which they all undoubtedly wanted to forget. In addition, there was the question of the length of time between when the trial occurred and our interviews.

In general, the victims we interviewed did not really remember how long they had been questioned by the crown attorney or cross examined by the defence counsel. In many cases, the distinction in terms of time between the two was blurred. Some made comments like "it felt like I was there forever", but then went on to say that they were probably questioned for about 15 to 20 minutes by each. However, one-half of the victims (five) stated that they had been questioned for over an hour by the crown attorney and an equal amount of time, if not more, by the defence.

Given the adversarial nature of the courts and especially the defence lawyer's role, it is not surprising that the victims had negative feelings towards the lawyers whose job it was to defend the accused. When asked how they felt about the defence lawyer, a number said that they "hated him" while others commented that they felt that he was trying to "trick" them. However, it appears that the negative feelings stemmed more from what the defence lawyer is required to do in a court of law than any specific thing that was said or done. In the words of one victim, "I know that he was just doing his job".

Based on the experiences of victims, it appears from our research that the new evidentiary rules are not operating as well as some supporters of the legislation had hoped. For example, four of the 10 victims said that the defence lawyer had tried to bring up their past in some way. They mentioned such things as references to the victim's other boyfriends, an attempt to introduce something the victim had written a number of years previously, and references to other behaviour of the victim such as the frequenting of particular clubs and a past criminal record.

Eight of the victims recalled having been asked questions by the defence about whether they had resisted, whether they had enjoyed it, or why they hadn't reported the assault sooner. It is worth noting that two of the victims mentioned that the judge put a stop to such questioning in their particular trials. In one case, the victim stated that the defence's main line of argument was that the victim consented and had enjoyed it, this despite the fact that there were four offenders who physically confined the victim. And in another case, the defence lawyer asked the victim a number of times why she got in the truck with the defendant, implying to the victim that it was her fault.

Overall, victims had praise for the judge who presided over their case. For example, a number spontaneously mentioned they thought the judge was "very fair" or "very good". In only one case, did the victim make a critical comment. In cases of a jury trial (seven of the ten), not one could remember any specifics about the judge's instructions to the jury.

5.2.6 Sentencing

In all 10 cases the defendant was found guilty as charged. For the most part, the victims were satisfied with the verdict, but 40 per cent felt quite strongly that the penalty

was not severe enough. One other victim expressed concern that the sentence the offender received would not be a deterrent to his committing the offence again, although she wasn't sure that a harsher sentence would be the solution. The sentences the offenders received varied from probation in two cases which involved "grabbing and touching" to nine years in prison on conviction for "aggravated assault". Figure 4 shows sentencing outcomes for the 10 cases where a suspect was apprehended and charged and the nature of the offence where no suspect was apprehended and where the victim chose not to report the incident.

Figure 4 Nature of Offence and Outcome

(Victim Interviews)

Nature of Offence	Sentence/Outcome
1) Anal Intercourse	Nine years in jail
2) Oral sex, genital intercourse and broom handle forced into rectum	Offender 1: 46 months jail Offender 2: 8 months jail, 1 month prob. Offender 3: 100 days jail
3) Sexual fondling, genital intercourse, digital penetration	Four years in jail
4) Sexual fondling, oral sex, genital intercourse	Three years in jail (under appeal)
5) Sexual fondling (plus Break and Enter)	Seven years in jail
6) Sexual fondling, sucking of breasts	20 days served weekends
7) Incest case (sexual fondling, oral sex, masturbation) and genital and anal intercourse by other men	Father: six years and six months in jail
8) Touching and grabbing	Two years probation
9) Grabbing and touching	Young offender: community service

Figure 4 Nature of Offence and Outcome (Cont'd)

(Victim Interviews)

Nature of Offence	Sentence/Outcome
10) Sexual fondling, genital intercourse, masturbation	Adult:10 weekends in jail Youths: 10 and 40 days in Youth Training Centre
11) Grabbed by breast while walking	No suspect
12) Grabbed by breast while jogging	No suspect
13) Attempted genital intercourse	No suspect
14) Sexual fondling, genital intercourse	Not reported
15) Genital and anal intercourse	Not reported
16) Oral and genital intercourse	Not reported
17) Genital intercourse	Not reported

The one area where victims were most critical of the justice system was that of sentencing. Two of these women felt quite bitter about what they perceived as lenient sentences and saw it as a "slap on the face" to them. However, it should also be mentioned that two of the ten victims were surprised at "how long of sentence" the accused received, and another two mentioned the fact that they were satisfied with the sentencing "under the circumstances".

What is interesting, but not surprising, is the apparent correlation between victims' attitudes towards the sentence and feelings on whether it was worthwhile to have reported the assault. All four who were critical of the length of sentence also felt strongly that it was not worthwhile to report the assault. All mentioned the "short sentence" as one of the reasons for their feeling this way. However, interestingly enough, this feeling of dissatisfaction did not bear directly on whether they would advise a friend. Only one of the four said that she definitely would advise a friend against reporting the offence to the police.

On the other hand, the other six who were relatively satisfied with the sentence the offender received felt that it was worthwhile to report the assault, and all said that they would advise a friend to report. In the three cases, where no offender was found,

all nevertheless felt it was worthwhile to report to the police and would recommend doing so to a friend.

5.2.7 Perceptions of the Legislation

A decision by the victim to file a complaint is the first stage in the filtering process. One assumes that such a decision is affected in part by her or his perception of what is involved. Changes in legislation, however, can only affect the reporting rate if the victim is aware of the changes. Of the 13 victims who did file a complaint, only two had any awareness that the law had changed and only one of the individuals knew what the nature of the changes were. The other 11 victims were not aware of the changes and a majority mentioned that they still do not know what the new legislation is all about. It is not surprising, then, that over one-half of the victims said that more education was needed in this regard to help victims of sexual assault.

Although victims may not have been aware of the changes, they did have opinions about the sexual assault laws. Six of the victims generally felt the laws were "fair", "pretty good"; three felt that the laws were "not strong enough", that "they stink" and "don't do anything for the victim"; four had no opinion (three of these did not go to trial). Both of the individuals who had been aware of the changes in legislation supported the renaming of "rape" to "sexual assault" and thought that the changes in general were "good". One mentioned that she felt the courts were treating sexual assault more seriously than before.

Of the four victims who did not report to the police, one woman very strongly opposed changing the term "rape" to "sexual assault". In her opinion, this change has diminished the severity and "ugliness" of the offence. It is merely a nice euphemism for a brutal act. Another felt very strongly that the changes in the legislation were no more than a "band-aid solution" which fails to address what she sees as the fundamental problem: the devaluation of women in society and the failure of the criminal justice system to take women seriously. She had no specific suggestions, however, about how one could improve things for victims, except to "restructure all of society" and "re-do all the attitudes". All four of these victims believe that the public perception is that sexual assault isn't taken too seriously and that the victim is seen as partially to blame for what happened.

5.2.8 Victims' Views on Improvements

To get a better understanding of what victims see as problem areas, we asked for suggestions about what would make things better for victims of sexual assaults. Sixty per cent (eight of 13) of the victims who reported to the police, specifically mentioned the need for more education about the legislation; what is sexual assault; and the need to convey that sexual assault isn't the victim's fault. Eight victims also mentioned the need

for more support and counselling services, both during and after the trial process. Three specifically mentioned the need for more women on the police force to help victims at the different stages. Two of the victims mentioned that they would like to see public access to the trial restricted, and another two mentioned that it was important that there always be a ban on publication of the victim's name and details of the case. In addition, two of the victims mentioned that it would be desirable if some way could be found that victims didn't have to appear in court so many times. (This comment was made by two individuals who had to testify a number of times, either because multiple offenders were involved or due to the complexity of the case.)

5.2.9 Conclusions

Based on our interviews, it appears that, in part, the new legislation has generally been experienced as a positive move from the perspective of victims. For example, neither the reporting to the police nor the experience in court turned out to be as horrendous or negative as it was purported to have been in the past. And while there is some divided opinion about the sexual assault laws and some vocal criticism about sentencing, the majority of the victims did feel that it was worthwhile to report the offence. What is most troubling, perhaps, is that most victims were not aware that changes in the legislation had occurred. The final section of this part of the report considers what we learned from examining and observing the few trials of adult sexual assault cases which have taken place over the period of this research.

5.3 Court Observations

During the 12 month period, there were five court hearings available for observation. One was a New Brunswick Court of Appeal hearing. One was in Provincial Court (Fredericton). Three were in the Court of Queen's Bench (two in Fredericton and one in Saint John). Of the latter, one involved a judge and jury and the other two were by judge alone. We will discuss what we have learned, in general terms, from our court observations.

The Court of Appeal case involved one male offender (a father) and two female victims. The trials in the Court of Queen's Bench consisted of one case where there was one male offender and one female victim, and one case (heard by judge and jury) where the complainant and defendant were males. The case in Provincial Court involved a male offender who was the husband of the complainant. In all cases (excluding the Court of Appeal), the defendants pleaded not guilty and none requested a change in plea.

5.3.1 Sexual Assault Trials

The defendants ranged in age from 21 to 44 years of age and two were married and two were single. Three of the defendants were from a lower socio-economic status and the occupation of one is not known. Two defendants were not employed at the time of the trial and one had just found employment, having previously been unemployed.

The complainants ranged in age from 16 to the mid 40s. Three were single and one was married. Two of the complainants were students. The occupation of one, at the time of the assault, is unknown; the other complainant works in a restaurant.

In two of the cases, the victim and the defendant were complete strangers. One involved an acquaintance and one was a legally married couple.

The original charges at the time of trial were laid under s. 246.1 for three of the cases and s. 149 (indecent assault on a female) in one case where the incident had occurred prior to 1983, but the case went to court in May 1988 as part of more recent complaints by a number of victims under 16. There were voir dire hearings in only one case. This was to determine the admissibility of witness testimony relating to a conversation overhead at a party a day prior to the offence being committed. The purpose of the this testimony was to show intent on the part of the accused. In another, there was a voir dire hearing to determine the admissibility of the defendant's statement which had been made to police. In both cases the evidence was allowed during the trial.

A motion by crown counsel for a ban on publication, regarding the identification of the victim, was requested and granted in three cases. In one of those cases there was a motion by the crown attorney for the severance of charges which was granted as well as a motion for trial. In one case, crown counsel introduced a motion concerning the alleged facts against the accused; this was granted.

A total of 13 witnesses (besides the four complainants) were called by the crown attorney in the four observed trials. Six of these were police officers, one of which testified with respect to forensic evidence. In general, the police officer's testimony was concerned with establishing the role of the police in the case (i.e., what was seen; what was done; and perceptions of the victim's physical and mental state). In two of the three cases where police officers testified for the crown they were cross-examined by the defence lawyer about such matters as identification procedures, photo lineups, exhibits taken from the scene and the completeness of notes taken in the interview with the accused.

The other witnesses who testified for the crown attorney had either helped the victim after the assault, lived in the same community as the accused, or had seen the victim shortly after the incident. One was an acquaintance of the accused, and one individual was working at the place where the offence occurred. In general, the

witnesses were questioned about the nature of their encounter with the victim after the offence, or about their knowledge concerning the whereabouts of the accused at the time of the alleged assault. In one case, however, a witness's testimony was used to try and demonstrate intent on the part of the accused.

In all four cases, the complainant did testify under oath and was cross-examined by the defence. However, in no case was the complainant questioned about her past sexual conduct or history. While the defence lawyers in all four situations did try to discredit the complainants testimony in various ways (by raising questions of identification and the failure to recollect specific details, by bringing up the individuals previous suicide attempt, by alleging that what had occurred was a passing family dispute), the complainants were not cross-examined about the timing of the first report. Nor was there an attempt made to prove complainants' consent by showing a failure to struggle. Also, no attempt was made to raise the issue of recent complaint. But in two cases questions were raised about the complainants role in bringing about or precipitating the incidence.

The total length of time the complainants had to be on the witness stand varied significantly, from 23 minutes in the shortest situation to two hours, 37 minutes in the longest situation. In the other two cases, complainants were on the witness stand two hours and five minutes and two hours and six minutes. In two cases, the complainant was cross-examined by the defence for a longer period than the questioning by the crown attorney, while in the other two cases the complainant was on the stand for a slightly shorter period of time in the cross-examination. In all four cases the complainant was called to the witness stand once for the crown and once for the defence.

The defendant testified in three of the four cases. In the fourth case, the defendant made a statement to the police which was allowed to be introduced as evidence by the crown, despite the defence lawyer's objection that the statement was incomplete. The defence lawyers did not bring up questions about the defendants' criminal record or prior history of sexual offences. In fact, such questions are not allowed to be asked in court, unless the defence raises them. But we know that in three of the cases there had been a prior criminal record. This fact became known at the time recommendations were made by crown for sentencing. In only one case, was the defendant questioned about the use of drugs or alcohol by his lawyer.

The basic thrust of the defence's argument in two of the cases was that of consent. In one case the defence argued that there was mistaken identity and in the fourth case, the defence alleged that no incident in fact took place. In no case did the crown attorney raise any objections concerning the defendant's testimony.

In the three cases where the defendant took the stand, he was cross-examined by the crown attorney concerning his intentions with respect to the victim or specific

actions. In two of the cases, the defence called one other witness and in both cases the individuals were cross-examined by the crown attorney.

In the three cases which were heard by judge alone, both the crown and defence were brief in their closing arguments. In one case the crown pointed to what it considered to be discrepancies in the arguments of the defence. In another case, the crown attorney reviewed a brief point on corroboration as it pertained to an incident which occurred in 1976 and mentioned that, given the situation, it was understandable the time references were vague. In the third case, the crown had to explain to the judge why the charges had not been brought before the Court earlier.

In its closing arguments, the defence lawyer raised the issue of credibility due to the length of time between the alleged offence and the reporting. In another case, the defence lawyer argued that there were discrepancies concerning the identity of the accused which raises a reasonable doubt that his client was the assailant; and in the third case the defence lawyer said he would leave it to the discretion of the court.

In the jury trial (defendant and complainant were both male), the closing arguments of both crown and defence were somewhat longer. In his summation, the crown attorney pointed out what it perceived to be discrepancies in the testimony of the accused and the defence's arguments, and suggested that the accused intended to have homosexual contact with the complainant. The crown attorney argued that the defence of honest belief of consent was not applicable since both the accused and complainant had consumed alcohol and drugs. The crown attorney questioned the credibility of the accused's story and suggested that he fit his testimony to avoid a sexual assault conviction.

The defence attorney did not dispute the material facts of the case, but emphasized that his client had an honest belief that there was consent on the part of the complainant. The defence attorney stated that if one looks at the context and sequence in which the events took place, it is reasonable to assume that the complainant was consenting to sex. No force had been applied. The defence further argued that there were reasons to doubt the reliability of the complainant's evidence and made reference to his suicide attempt. He concluded by asking the jury to apply the standards required by the criminal justice system with an open mind and stated that the accused committed no crime and had no criminal intent.

In his instructions to the jury (five males and seven females), the judge emphasized the following points. He stated that the jury is the sole arbitrator of the facts and that it is their duty to determine the facts of the case from all the evidence presented in court. He stressed that the presumption of innocence is a fundamental principle and that it is the duty of the crown to prove beyond a reasonable doubt that the accused is guilty. If there is doubt, one must give the benefit to the accused. The judge also mentioned that the sexual assault legislation now applies to both sexes and that assault has to be present, before there is sexual assault. He emphasized that

"consent" is the key factor in determining assault or sexual assault. The judge noted that since the defendant admitted to a sexual act, the crown did not have to prove the sexual nature of the act but does have to prove assault.

The judge explained the concept of "mens rea" and when it applies. He also told the jury if they decided that the accused had an honest belief that the complainant consented, then the accused should be found not guilty.

The crown had brought forth two charges in this case, one of sexual assault and one of gross indecency. The judge explained that only if the jury found the accused not guilty on the first charge was it to consider the second. He stressed that the jury's verdict must be unanimous and mentioned some of the evidence presented by the crown and the defence which could be considered. And he told them not to be concerned with a sentence. The jury was out for a total of five hours and 29 minutes. In this particular case, the defendant was found guilty and was sentenced to 90 days to be served on weekends. Moreover, he was prohibited, for one year, from picking up hitchhikers and from renting a hotel or motel room, unless it was on behalf of his family.

In all four cases, the defendant was found guilty as charged. In all cases, the crown recommended incarceration. However, the sentence imposed by the judge varied from the minimum sentence of three months probation and a $50.00 fine to a maximum sentence of two years less a day to be served in an institution which offered psychological treatment. The other two sentences were two months incarceration and 45 days incarceration with one year probation.

In pronouncing sentence, the judge did take certain aspects of the cases into account. In the case involving a married couple, the judge commented on the relationship between the parties and suggested that there would have been a stiffer sentence, if the case had been brought forward sooner by the crown. In the two cases involving strangers, the judge commented on the assault-related aspects of the incident. In the one case which involved a male defendant and a male victim, the fact that the parties were of the same sex did not appear to affect the sentencing. And in one of these cases, (the one which received the stiffest penalty), the judge remarked on both the character and early childhood experience of the defendant and said that there were four factors he had to consider in sentencing: punishment, protection of the public, deterrents and rehabilitation. He referred to the terror that the victim must have felt and stated that "society and women in particular have a right to be free from such fear and violence". In the fourth case, the judge also commented on the character of the defendant and mentioned that the sentence would have been greater if the case had been dealt with immediately after the offence. (This case came to trial ll years after the offence occurred as part of multiple charges by eight victims against the defendant.)

It does not appear that the question of penetration was considered a factor in either establishing that sexual assault had occurred or in sentencing. (Genital intercourse had occurred in one case and attempted anal intercourse had occurred in

another. The other two cases involved touching and/or grabbing sexual parts of the body, for example, breasts or crotch area.)

Also it does not seem that the situation or activity preceding the assault was used in any way to discredit the victim. (Two of the victims had been hitchhiking, one was offered a ride home by an acquaintance and the fourth was in her home which she occupied with the assailant, her husband.) In other words, from the cases we observed, the change in legislation does appear to have made the situation less harassing for the victim in court. The removal of spousal immunity and the "degenderizing" of the legislation has meant that a wider range of incidents are being tried under the relevant sections of the Criminal Code.

5.3.2 Court of Appeal Hearing

We observed one Court of Appeal hearing of a case where "gross indecency" charges had been laid. This involved two daughters as victims and the father as defendant. Since the incidents had occurred over a number of years, and in the case of one daughter took place prior to the change in legislation in 1983, the charge was of "indecent assault" rather than "sexual assault".

The lawyer for the appellant argued on two main grounds. His first argument, based on a procedural and technical matter, was that the trial was a nullity since the jury was not given an original copy of the indictment, but rather had been provided with a photocopy. His contention was that an indictment means original document. His second argument centered on the use of "similar fact evidence" that he thought should not have been allowed in that it was highly prejudicial and overwhelmed the jury. He then went on to raise the issue of sentencing and objected to the maximum sentence of five years on Count 1 and the fact that Count 2 was not served concurrently. In his view, the sentence was excessive since he felt that there was no evidence that the daughters were scarred in any way and that there had not been threats and coercion. He also noted that "gross indecency" was no longer in the Criminal Code.

The lawyer representing the crown disputed the contention that an indictment given to the jury must be in the form of an original indictment. All that is required, according to the crown's lawyer, is that the jury know the charges. On the second point, he argued that similar fact evidence is admissible in situations where there is a system of behaviour involved, such as this, which showed a system of education, a system of instruction of sex, and a system of using the daughters for sexual gratification. Similar fact evidence, he said, was used for probative reasons to establish the case beyond a reasonable doubt.

In response to the comments made by the appellants lawyer on sentencing, the lawyer for the crown stated that the maximum sentence was appropriate. He further pointed out that while there may not have been any physical violence to the victims, one

had to look at the psychological damage which is far reaching and could have devastating effects in later life. He closed his arguments by stating that the trial judge had considered the nature of the totality of the offence in his sentencing. No rebuttal was made by the appellant's lawyer.

The three judges who heard the arguments denied the appeal on both counts. On the first point, the Court of Appeal ruled that there was no authority in code or case law which necessitated that a jury be given the original indictment. On the second ground, it was pointed out that the trial judge had a voir dire to determine the admissibility of similar fact evidence. The trial judge concluded that the evidence indicated a system was involved and admitted it for that reason. The case of Queen v. Thompson upheld the use of similar fact evidence when it showed a system, and in the view of the Court of Appeal there was no error in law on the part of the trial judge. The issue of sentencing was not addressed. The appeal on conviction was dismissed.

6.0 CONCLUSIONS

6.1 Introduction

This evaluation research has examined the impact of Bill C-127 in two New Brunswick jurisdictions, Fredericton and Saint John, using a variety of data sources. As one of several evaluations in Canada, the objective of the research has been to contribute to a more general understanding of the legislation and how it is working. Is it attaining the objectives sought by those who advocated a change in the way sexual assault is dealt with in the Canadian criminal justice system? As described in Section 1.0 dissatisfaction with the previous law centered on the low conviction rate in sexual assault cases, the victim's negative and painful experiences with the policing and court process and the patriarchal attitudes and incorrect ideas that were reflected in, and reinforced by, the old law.

Thus, law reform was intended to increase reporting and conviction rates and generally improve the victim's experience of the criminal justice system. Moreover, it was hoped that changes to the law would also change attitudes and practices within the criminal justice system which, in turn, would affect the attitudes and reactions of victims of sexual assault.

We view the findings presented in this report as a contribution rather than a definitive evaluation of Bill C-127 for two reasons: First, it is based on only two Canadian jurisdictions both of which are relatively unique culturally, in terms of size and the relatively low level of reported crime and violence compared to other parts of Canada. Second, and as a result of these factors, this evaluation is based on a small data base. However pervasive it may be in people's consciousness, statistically rape and sexual assault offences comprise a very small proportion of reported crime. As we have pointed out, from a research standpoint, this becomes especially problematic in relatively small jurisdictions.

In turn, the small numbers of sexual assault cases are, as we have seen, spread thinly over the actors in the criminal justice system. With some exceptions, those identified as key informants may deal annually with a very small number of adult sexual assault cases. In short, any conclusions we reach about the impact of Bill C-127 must remain tentative, until these particular findings are added to and compared with those from the other evaluations.

Having introduced these caveats, what conclusions can we draw from this research project? In the preceding sections of this report, we have described the findings from each of the data sources in seriatim. That is, we have not for the most part attempted to provide a synthesis of the findings. Yet, the logic of using a multi-faceted research design was to achieve some degree of triangulation on the central

questions of this evaluation. The hope in such a design is that if various data sources, however limited, are individually saying the same thing, one can have greater confidence in conclusions reached about that question.

The main task of the final section is to provide a synthesis. For the most part, the following discussion is organized around the original evaluation issues set forth in the original proposal and the subsequent research design report. Fundamentally, we have been raising two kinds of questions. First, have certain practices changed since Bill C-127 came into force? And, second, what are the problems, related or unrelated to the legislation, for victims and for those who, one way or another, deal with sexual assault cases, victims and offenders?

With respect to the first question, "before" and "after" comparisons have been used wherever relevant and feasible. But, it is apparent to most of our key informants that many of the perceived changes in attitudes and practices either preceded Bill C-127 or were underway when it came into force in 1983. As one Court of Queen's Bench judge put it, "When proposed new legislation hardly gets a blip on the Richter scale of public opinion, you know the reform was long overdue". Thus, while the provisions in Bill C-127 are generally seen as making it easier to prosecute sexual assault cases, the legislation itself is also generally perceived as part of a larger shift in attitudes about sexual offences and the rights of individuals to refuse unwanted advances and acts of a sexual nature. The second question is simply a recognition that while it may not be possible to make definitive "before" and "after" comparisons and to decide if an improvement has occurred, if there are perceived or objective problems, it is the responsibility of the evaluation to point them out.

6.2 Reporting Issues

Undoubtedly, and as we have been compelled to repeat several times, the focus of attention has shifted rather dramatically from adult cases to those in which the victim is under 16. And there is a high degree of consensus that there is now a much higher level of reporting of such cases. This is generally attributed to changes in legislation and procedures within the child protection services and to a generally heightened awareness of the problem rather than to Bill C-127. Insofar as adult cases are concerned, patterns of reporting and the method of reporting have not changed appreciably over the period of this evaluation. Under the previous legislation and present legislation, about three-quarters of cases, it is the victim who reported the incident. Similarly, in both periods, actual sexual intercourse or attempted sexual intercourse is the basis of the complaint in about one-third of reported sexual assaults. One change observed is that in the post-legislation period, reports involving touching and grabbing have declined to about one-half of what they were in the prelegislation period. In general, these incidents have been replaced by a range of other kinds of complaints which go beyond mere touching or grabbing, but that also fall short of attempted or actual sexual intercourse. At the same time, the perception of some key informants, notably defence lawyers, is that the

reverse has occurred and that the police and the courts are prosecuting many more cases of what are generally acknowledged to be less serious offences.

One of the central objectives of the reform of the legislation was to encourage more victims of a sexual assault to report it to the police. This is, of course, not a question easily answered empirically for the simple reason that we do not know the actual number of sexual assaults that occur in a given year, or whether the rate for this offence is on the rise or the decrease. The conservative assumption is that the real rate of sexual assault in at least these two communities has remained much the same over the 1980s and perhaps an even longer period. As noted earlier, the absolute numbers of sexual assaults reported to the police, annually has remained remarkably constant over the seven years included in this evaluation. The cautious conclusion drawn from these statistics, then, is that the provisions of Bill C-127 have had no discernable impact one way or the other on the likelihood of adult victims reporting a sexual assault.

Nor, is there evidence that the gender neutral language of the legislation and the fact that offenders married to the victim are no longer immune from prosecution resulted in a "rash of homosexual cases" or "married couple cases." There have been a few such cases, but the fact remains that the vast majority of victims are young single women who have been assaulted by a male. While there is a somewhat greater tendency for these victims in recent years to know or at least be acquainted with their alleged assailant, only about two per cent of cases in both periods fall into the category of "date rape." The police records indicate only one case where a woman (along with two males) has been charged with sexual assault.

6.2.1 Public Awareness of the Implications of Bill C-127

Over the course of this project, all members of the research team have, on several occasions, been required to explain to colleagues interested in the research we were doing not only that there had been changes in the legislation, but also what those changes were. It was evident that even within this generally informed group (and excepting most of our feminist colleagues who generally are knowledgeable about the issues), there is little awareness of even such a fundamental change as the conceptual shift from rape to sexual assault.

We do not know what the level of awareness is in the public regarding Bill C-127. However, one of the more striking findings that emerged from our interviews with sexual assault victims is that at the time of the assault, the vast majority were unaware of any change in the law. Although a majority had reported the assault and been involved in a trial, they appeared, even afterwards, to have a very limited and sketchy knowledge of the law and of what had changed. Certainly, it was apparent that for these victims the decision whether to report the assault was not based on awareness and optimism that because of legislative change, their ordeal in the criminal justice system might be lessened.

The preceding impressions and findings will, we expect, come as no surprise to our key informants. As we have seen, there is widespread belief that even prior to enactment of Bill C-127, attitudes and practices were in the process of changing. But many of these key informants had in mind those who work within the criminal justice system and related systems and services. As their comments often suggest, they are less confident that the public, generally, is aware that there has been a change or has necessarily accepted the conceptual changes built into the legislation. Many people are seen as still making a clear distinction between rape and other forms of sexual assault.

6.3 Processing Issues

The majority of evaluation issues relating to processing and filtering of cases through the criminal justice system have focused on how changes in evidentiary requirements have affected the types of evidence collected, police and crown procedures, criteria in determining whether to prosecute a case, charging practices and patterns of sentencing.

At this point in an already lengthy report, we will not attempt to go through these issues in detail and singly. However, as we view the findings from the analysis of criminal justice files and our interviews with various key informants, including victims, the conclusion that emerges is one of a contradiction. Quite simply, these data lead us to conclude that, in one sense, everything has changed and in another, nothing has changed. To put it more concretely, there is a general perception of change but in terms of the outcomes under "process", there is little empirical evidence to back these definitions of situation. In the following paragraphs, we briefly examine this paradox and consider how it might be interpreted.

First, with respect to the empirical evidence, as we have seen on a wide range of variables, case characteristics remain very similar before and after the legislation came into force, as do the numbers of cases reported and subsequently prosecuted in any given year. While there has been a slight increase in the proportion of defendants entering a guilty plea, changes are modest. More generally, conviction rates and sentencing patterns appear very similar in the two periods. There is, theoretically, somewhat more room for plea bargaining under the new legislation than the old. However, the data do not suggest that in either period this kind of negotiation occurred very frequently, a conclusion borne out by what crown attorneys and defence lawyers told us. In short, and keeping in mind that we are dealing with a small data base, the conservative conclusion from these data is that nothing much has changed.

At the same time, the majority of key informants, in particular, police, crown prosecutors, defence lawyers and judges, believe that the legislation has brought about considerable and sometimes dramatic change in the processing of sexual assault cases. In part, these perceptions centre on the very different treatment afforded to the victim. But there is near unanimity that, whether positively or negatively, the legislation has had

major impact legally and procedurally. Thus, as both police and crown attorneys told us, their job is now easier because it is possible to proceed with a case in the absence of corroborative evidence, without recent complaint and with a victim whose past history and recent behaviour might, in the past, have made her unrapeable. As a result, defence lawyers are agreed that these changes have made their defending a client much more difficult. And, as judges told us, if they do not want an appeal, their instructions to a jury have had to be modified considerably.

Nevertheless, a police officer or crown prosecutor would not prefer to recommend charges and to proceed to prosecution, with evidence that removes any doubt about "credibility" and "reasonable doubt?" Clearly, such evidence will be obtained wherever possible. From the defence lawyer's perspective, some of the traditional tools of defending a sexual assault case have been taken away, but not all. For example, as one judge put it, he won't let the defence "go on fishing expeditions" but he is required to consider an application for permission to enquire into the victim's past history and recent behaviour, a strategy that in one recent case led to the acquittal of one of the defendants in a multiple offender case. However, the crown has also lost one of the more valuable tools in demonstrating the credibility of the victim's testimony, that the victim raised a "hue and cry" at the earliest possible opportunity. While meant to assist the victim too afraid or too traumatized to report immediately, there is consensus that this provision has backfired. This is because with the exception of protracted cases of incest, it appears that the vast majority of victims who report at all, do so with considerable promptness.

To sum up, the two jurisdictions studied generate very few reports of sexual assault and the nature of these is, as we have seen, very similar over the years. While the vast majority are viewed as founded by the police, only in a minority of cases is it possible to lay charges and to recommend prosecution. The most obvious factor filtering reported cases out of the system, and one that has not changed, is that an offender is apprehended in just under fifty per cent of cases. Among these are some where, under the old or new legislation, there simply is not sufficient evidence to charge the accused or to anticipate a conviction. Those that do proceed to prosecution will ordinarily be ones where the evidence is fairly strong and there is, in fact, corroborative evidence. Of these, about one-third will plead guilty, obviating the need for a trial. In the others, the nature of the evidence is such that convictions would be obtained even if the new evidentiary requirements did not apply. Under either the old or new laws, the chances are high that the accused would be found guilty. We are left, then, with a very small number of cases in which the issue becomes one of consent and of the victim's word against the offender's. The fact that they are a minority does not make them less important. What happens between reporting and the final verdict is of utmost concern to both the victim and the defendant, to case law and sometimes the establishment of precedent. But there are simply too few and the fact situations too unique for us to expect to show, statistically, the impact of the legislation on these kinds of processes and outcomes. Conclusions about changes in the victim's experience of the criminal justice system are somewhat less equivocal.

6.4 Issues of Fairness and Victim Treatment

Much criticism of the previous legislation centred on the inhumane and undignified way in which victims of rape or sexual assault were treated when they did have the courage to report to the police and carry through with a prosecution of the case. The conceptual change from rape to three levels of sexual assault, abrogation of evidentiary rules and the gender neutral language of Bill C-127 were viewed as objective ways of lessening the ordeal and the stigma attached to those who have been victimized. As just described, some of these changes, notably those related to evidentiary requirements, probably have little or no relevance and, therefore, have an impact on the majority of cases which do go forward to prosecution. Recent complaint is often not at issue because the victim reported at the first opportunity. Similarly, in most cases involving strangers, particularly where there was forced entry into the victim's residence and a subsequent sexual assault, consent or an honest belief in consent will not be at issue with the result that the past history and reputation of the victim would under both sets of legislation be viewed by most judges as irrelevant. And, finally, in the majority of cases the police investigation does produce corroborative evidence.

In other words, these objective changes do create new procedural and legal structures and do have the potential to affect some cases which, under the previous legislation, might not have proceeded to prosecution. But it is has also been recognized that if there is to be a substantive improvement in how the majority of sexual assault victims are to be treated in the criminal justice system, attitudinal changes are more crucial than legal changes. There is, we believe, rather conclusive evidence from all of our data sources, that such an attitudinal shift has occurred. Even defence lawyers who, universally, have considerable concern about the rights of offenders to a fair trial under this legislation, are in agreement that things have improved for the victim and that in the vast majority of cases, this change is appropriate.

Analysis of police files and our interviews indicate that, as much as resources and schedules allow, female victims of sexual assault are seen by a female police officer and the same officer follows through with subsequent interviews. Crown attorneys appear to spend considerable time with these victims and to encourage the use of the victim witness program when this is not possible. While in adult cases, judges are reluctant to close the court, our court observations, judges comments and those of crown prosecutors all suggest that judges are extremely sensitive to the emotional state of the victim. As a result, it is an uphill battle for defence lawyers to introduce evidence about the past history of the victim into their cross-examination. Consequently, few attempt to do so.

The experience and assessments of victims interviewed in this study suggest that these are not simply self-congratulatory comments and perceptions on the part of the these other key informants. Rather, those we were able to interview felt that, on the whole, they had been treated with considerable compassion and sensitivity by both police and the crown attorney. While, understandably, most did not like the defence lawyer

and the cross-examination, it did not appear that she or he attempted to put the victim "on trial". As described in Chapter 4.0, the major source of dissatisfaction and bitterness for victims was not the reporting or the trial process, but the outcome of the trial. Most were outraged at the mild sentence given to their assailants. While an obvious area of concern and one that, no doubt, may have impact on the willingness of victims to report an assault, it is also an issue that applies to all victims of crime and goes beyond this particular section of the Criminal Code. Simply, most victims feel that the punishment does not fit the crime and emerge from the process feeling that justice has only been partially realized, whatever the nature of their victimization.

Feminists and others have put considerable effort into dispelling myths about rape. At the same time, the evidence of this evaluation does suggest that there may be some equally persistent but outdated myths about how victims of sexual assault are, in fact, treated by the criminal justice system. Whether the driving force behind these changes has been the provisions in Bill C-127 or these are, themselves, manifestations of a wider change in attitudes and practices is unclear and beside the point. The point is that this study provides rather consistent evidence that the basic objectives of the legislation are being met. At present, and apparently for some time, victims in these two jurisdictions have been treated with dignity and sensitivity. This is not to suggest that reporting a sexual assault and going through a trial will not be an ordeal. Whatever the offence, testifying within the adversarial system is inherently a difficult process. As key informants and victims made clear, it is doubly so when the testimony concerns one's own victimization as a result of a sexual offence. But to conclude, there is every indication that much is being done, formally and informally, to ensure that the ordeal is not exacerbated. It is time that this more positive and optimistic view of the sexual assault victim's experience with our criminal justice system be conveyed to those who are potential victims and who deal with these victims.

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APPENDIX A

RESEARCH REPORTS

FROM THE

SEXUAL ASSAULT EVALUATION PROGRAM

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FROM THE SEXUAL ASSAULT EVALUATION PROGRAM

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